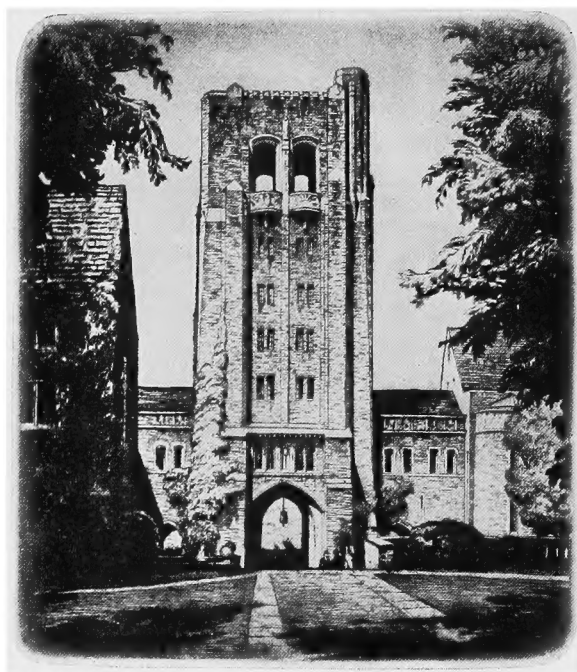




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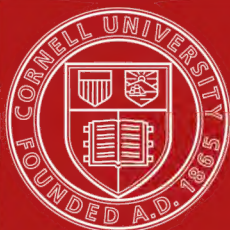
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PRINCIPLES  
OF THE  
LAW OF CONTRACTS  
AS EXHIBITED IN  
SPECIAL CONTRACTUAL RELATIONS

SECOND EDITION

REVISED AND ENLARGED BY

ISRAEL A. WASHBURN

ASSOCIATE PROFESSOR  
IN THE NEW YORK LAW SCHOOL

ST. PAUL  
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# PRINCIPAL AND AGENT

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23. Lien of Agent.

## AGENT DEFINED

1. An agent, in the broadest sense, is a person authorized by another, called the principal, to act on his behalf.

An agent, in the narrower sense in which the term is used to distinguish the person to whom it is so applied from other so-called agents, is a person authorized by another, called the principal, to represent him, in bringing him into legal relation with a third person.

The terms "principal" and "agent" are difficult to define because they are used in different senses. In the broader sense in which the terms are frequently used, the relation of principal and agent exists whenever, by reason of authority conferred by one person upon another to act on his behalf, the act of the latter—not necessarily an act authorized—is by law imputed to the former. The actual doer of the act is said to be the agent of the other, because in the commission of the act he represents him; that is, because the act, in respect to the obliga-

tions and rights to which as between the other and third persons it gives rise, is in legal effect the other's act.

The terms "principal" and "agent," and even "agency," are, however, commonly used in the narrower sense above set forth.<sup>1</sup>

### *Servant and Agent Distinguished*

The terms "servant" and "agent" are frequently used interchangeably,<sup>2</sup> but a distinction may conveniently, and it is believed properly, be drawn between them. A servant is a person employed by another, called the master, to render to him, subject to his direction and control, personal service in the performance of acts which are not of a nature to create new legal relations between the employer and third persons. An agent is a person authorized by another, called the principal, to represent him in bringing him into legal relations with third persons.<sup>3</sup>

Of course, one and the same person may be employed in both capacities. For example, a servant may be directed by his master to make a sale, and to use the master's wagon in going to the place of sale; and on the way he may, by careless driving, injure a third person; and in making the sale he may give a warranty which he was not authorized to give. Here the liability of the employer for the injury results from the relation of master and servant; while his liability for the warranty, if he is liable, results from the relation of principal and agent.

### *Classes of Agents*

Agents are sometimes divided into classes based upon the different nature and extent of their authority or upon other points which make the particular classification convenient.<sup>4</sup> Thus agents are classed as universal, general, and special;<sup>5</sup> mercantile and nonmercantile;<sup>6</sup> *del credere* and not *del credere*;<sup>7</sup> professional and nonprofessional;<sup>8</sup> gratuitous and paid.<sup>9</sup>

<sup>1</sup> See Huffcut, *Ag.* (2d Ed.) 10, note 5.

Probably the essential idea of agency is that one person executes the will of another. Hence "agents" include servants, but not independent contractors.

<sup>2</sup> 1 Blackst. Com. 427. Cf. Perkins, *Prof. Book*, §§ 184, 185.

<sup>3</sup> Dwight, *Pers. & P. P.* 323; Anson, *Contracts*, 329; Wright, *Prin. & Ag.* 2; Pollock, *Contr.* (3d Ed.) 49.

See, also, *Kingan & Co. v. Silvers*, 13 Ind. App. 80, 37 N. E. 413.

<sup>4</sup> Evans, *Prin. & Ag.* 2.

<sup>5</sup> Post, p. 57.

<sup>6</sup> Under the English Factors' Act (52 & 53 Vict. c. 45), "mercantile agents," as therein defined, have peculiar powers with respect to the disposition of goods.

<sup>7</sup> *Lewis v. Brehme*, 33 Md. 412, 3 Am. Rep. 190.

<sup>8</sup> Tiff. *Ag.* p. 179.

<sup>9</sup> *Id.* p. 410.



Certain classes of agents have acquired specific names based upon the nature of their duties. Among these may be mentioned factors or commission merchants, whose business it is to receive and sell goods upon commission; brokers, whose business it is to make bargains for others or to bring persons together to bargain; auctioneers, whose business it is to sell property at public sale; attorneys at law, whose business it is to act for others in litigation or other legal proceedings; bank cashiers, who are the chief executive officers of banks, and through whom the financial operations of banks are transacted; and shipmasters, who are agents for many purposes during the voyage.<sup>10</sup>

The law of partnership is closely connected with the law of agency, for a partner virtually embraces the character of a principal and of an agent. Indeed, it is often difficult, upon particular facts, to determine whether the resulting relation is one of partnership or of mere agency.<sup>11</sup>

## CREATION OF RELATION

### 2. The relation of principal and agent may be created—

- (1) By appointment;
- (2) By estoppel;
- (3) By law (from necessity);
- (4) By ratification.

Ordinarily the relation of principal and agent is founded upon agreement or mutual assent.<sup>12</sup> The assent of the principal may be given before performance of the agent's act; that is, by appointment of the agent. Or it may be given after performance; that is, by ratification.

Under some circumstances, however, agency may exist for one purpose or another without the assent of the principal or the agent or either.

## AGENCY BY APPOINTMENT

### 3. The appointment of an agent may be express or implied. It may be effected (a) by a contract of employment, or (b) by request of the principal for performance of an act, followed by the entrance by the agent upon its performance.

<sup>10</sup> Tiff. Ag. p. 221.

<sup>11</sup> George, Partn. 8.

<sup>12</sup> Pole v. Leask, 33 L. J. Ch. 155, 161; Marwick v. Hardingham, 15 Ch. D. 349; Graves v. Horton, 38 Minn. 66, 35 N. W. 568; McGoldrick v. Willits, 52 N. Y. 612, 617; Green v. Hinkley, 52 Iowa, 633, 3 N. W. 688; First Nat. Bank v. Free, 67 Iowa, 11, 24 N. W. 566.

The agreement which forms the basis of the relation of principal and agent is commonly called a contract of agency.<sup>13</sup> So far as concerns the liability of the principal to third persons, however, it is wholly immaterial whether the agreement between principal and agent has the character of a contract or falls short of contract. It is not even necessary, indeed, that the agent have capacity to contract.<sup>14</sup> The principal is bound by the act of the agent simply because he has authorized it. On the other hand, the mutual obligations of principal and agent rest largely upon contract, express or implied. Thus, though a principal may be bound by the act of an agent who is devoid of contractual capacity, he could not, because of the absence of a valid contract, maintain an action against the agent for failure to obey instructions, nor could the agent maintain an action to recover compensation.

#### *Gratuitous Agency*

An executory agreement of employment, which contemplates gratuitous services on the part of the agent, is without consideration and nudum pactum.<sup>15</sup> No obligation arises under it, up to the moment it is acted upon.<sup>16</sup> Once acted upon, the authority to that extent is irrevocable, and the act performed is binding upon the principal. The rule is accordingly laid down that a gratuitous agent is not liable for nonfeasance, but is liable for misfeasance; in other words, that until he has entered upon the work he is under no obligation, but that if he has entered upon it, and so affected the position of his employer, he becomes liable for negligence in performance.<sup>17</sup> Thus, one who has gratuitously undertaken to procure insurance for another incurs no liability by failure to insure, but if he proceeds to carry his undertaking into effect by getting a policy, and does it so negligently that the other cannot recover upon the policy, he is liable to an action.<sup>18</sup>

<sup>13</sup> Evans, Ag. 2; Mechem, Ag. § 3.

<sup>14</sup> Post, p. 32.

<sup>15</sup> Thorne v. Deas, 4 Johns. (N. Y.) 84; Wilkinson v. Coverdale, 1 Esp. 75. Cf. Elsee v. Gateward, 5 T. R. 173; Balfe v. West, 13 C. B. 466; Benden v. Manning, 2 N. H. 289.

<sup>16</sup> "The law on this point is somewhat obscure. Perhaps it may best be explained by saying that, where a man undertakes to act as agent or do any other service for another gratuitously, the contractual liability does not arise till he has entered upon the work and so affected the position of his employer; and that up to that moment there is nothing but a request to him to do the work importing a promise to indemnify him for losses which may be incurred if he do it." Anson, Contr. 333.

<sup>17</sup> Wilkinson v. Coverdale, 1 Esp. 75; Walker v. Smith, 1 Wash. C. C. (U. S.) 152, Fed. Cas. No. 17,086; Williams v. Higgins, 30 Md. 404; Passano v. Acosta, 4 La. 26, 23 Am. Dec. 470; Spencer v. Towles, 18 Mich. 9; Isham v. Post, 141 N. Y. 100, 35 N. E. 1084, 23 L. R. A. 90, 38 Am. St. Rep. 766.

<sup>18</sup> Thorne v. Deas, 4 Johns. (N. Y.) 84. In this case Chancellor Kent re-

*Appointment to Execute Instrument under Seal*

It is an ancient doctrine of the common law that authority to execute an instrument under seal must be evidenced by an instrument of equal solemnity. Hence authority to execute a deed must be conferred by power under seal.<sup>19</sup> This rule, however, does not apply to an instrument executed by another in presence of the principal, at his request.<sup>20</sup>

It does not necessarily follow that a sealed instrument executed by an agent under parol authority is without effect. If a contract need not be by specialty, it will be valid as a simple contract, notwithstanding that a seal was attached.<sup>21</sup> So a conveyance executed by an agent authorized only by parol may have effect in equity as a contract to convey, and support a suit for specific performance.<sup>22</sup>

*Appointment to Execute Writings under Statute of Frauds*

The provisions in the statute of frauds<sup>23</sup> in respect to the authority of agents to execute the writings thereby required are of two sorts. Under the first and third sections, which relate to the creation, trans-

gards the rule as thus settled, although unreasonable and contrary to the Roman law.

<sup>19</sup> *Berkley v. Hardy*, 8 D. & R. 102, 4 B. & C. 355; *Banorgree v. Hovey*, 5 Mass. 11, 4 Am. Dec. 17; *Blood v. Goodrich*, 9 Wend. (N. Y.) 68, 24 Am. Dec. 121; *Paine v. Tucker*, 21 Me. 138, 38 Am. Dec. 255; *Heath v. Nutter*, 50 Me. 378; *Cooper v. Rankin*, 5 Bin. (Pa.) 613; *Gordon v. Bulkeley*, 14 Serg. & R. (Pa.) 331; *Perry v. Smith*, 29 N. J. Law, 74; *Rowe v. Ware*, 30 Ga. 278; *Overman v. Atkinson*, 102 Ga. 750, 29 S. E. 758; *Elliott v. Stocks*, 67 Ala. 336; *Peabody v. Hoard*, 46 Ill. 242; *McMurtry v. Brown*, 6 Neb. 368; *Calhoon v. Buhre*, 75 N. J. Law, 439, 67 Atl. 1068.

A partner cannot bind his firm by deed unless authorized under seal. *Harrison v. Jackson*, 7 T. R. 207.

<sup>20</sup> *Ball v. Dunsterville*, 4 T. R. 313; *King v. Longnor*, 4 B. & Ad. 647; *Hudson v. Revett*, 5 Bing, 368 (filling blanks); *Gardner v. Gardner*, 5 Cush. (Mass.) 483, 52 Am. Dec. 740; *Mutual Ben. Life Ins. Co. v. Brown*, 30 N. J. Eq. 193; *Meyer v. King*, 29 La. Ann. 567; *Mackay v. Bloodgood*, 9 Johns. (N. Y.) 285; *Eggleston v. Wagner*, 46 Mich. 610, 10 N. W. 37; *Croy v. Busenbark*, 72 Ind. 48.

<sup>21</sup> *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330; *Long v. Hartwell*, 34 N. J. Law, 116; *Wagoner v. Watts*, 44 N. J. Law, 126; *Dickerman v. Ashton*, 21 Minn. 538; *Hammond v. Hannin*, 21 Mich. 374, 4 Am. Rep. 490; *Ledbetter v. Walker*, 31 Ala. 175; *Shuetze v. Bailey*, 40 Mo. 69; *Marshall v. Rugg*, 6 Wyo. 270, 44 Pac. 700, 45 Pac. 486, 33 L. R. A. 679; *Nichols v. Haines*, 39 C. C. A. 235, 98 Fed. 692; *Wood v. Wise*, 208 N. Y. 586, 102 N. E. 1117; *Calhoon v. Buhre*, 75 N. J. Law, 439, 67 Atl. 1068. Contra: *Wheeler v. Nevins*, 34 Me. 54; *Baker v. Freeman*, 35 Me. 485; *Overman v. Atkinson*, 102 Ga. 750, 29 S. E. 758; *Cummins v. Cassily*, 44 Ky. (5 B. Mon.) 74.

<sup>22</sup> *Morrow v. Higgins*, 29 Ala. 448; *Groff v. Ramsey*, 19 Minn. 44 (Gil. 24); *Hersey v. Lambert*, 50 Minn. 373, 52 N. W. 963; *Watson v. Sherman*, 84 Ill. 263; *Jones v. Marks*, 47 Cal. 242; *Joseph v. Fisher*, 122 Ind. 399, 23 N. E. 856; *Lobdell v. Mason*, 71 Miss. 937, 15 South. 44.

<sup>23</sup> 29 Car. II. c. 3.

fer, and surrender of estates or interests in land, the writings required, if executed by agents, must be signed by "agents thereunto lawfully authorized by writing."<sup>24</sup> Under the fourth and seventeenth sections in England and in America, in those states where the substance of these sections has been re-enacted, it is held that the manner in which the agent may be "lawfully authorized" is left to the rules of the common law, and hence that the agent need not be authorized by writing, and that any form of ratification is sufficient.<sup>25</sup>

### *Implied Appointment*

The appointment of an agent may be implied as well as express; that is, it may be evidenced by conduct as well as by words. Authority to act as agent will be implied whenever the conduct of the principal is such as to manifest his intention to confer it.<sup>26</sup> The so-called implication is of course nothing more than a logical inference from facts, and must be distinguished from an estoppel. Thus where an agent repeatedly performs acts not expressly authorized, which the principal adopts without question, his conduct readily gives rise to the inference that he desires the agent to perform other acts of the same kind, and may hence be evidence of intention to vest the agent with authority to perform them.<sup>27</sup>

<sup>24</sup> Where the statute requires that the agent must be authorized in writing, it has been held that the statute is not satisfied by a signature by another, in presence of the principal, at his verbal request. *Wallace v. McCollough*, 1 Rich. Eq. (S. C.) 426. Cf. *Bramel v. Byron* (Ky.) 43 S. W. 695; *Billington v. Com.*, 79 Ky. 400; *Dickson's Adm'r v. Luman*, 93 Ky. 614, 20 S. W. 1038. But there is authority opposed to this view. *Gardner v. Gardner*, 5 Cush. (Mass.) 483, 52 Am. Dec. 740, and cases cited ante, note 19. See *Browne*, Stat. Frauds (5th Ed.) § 12b.

Authority required to be in writing. *Chappell v. McKnight*, 108 Ill. 570; *Gerhart v. Peck*, 42 Mo. App. 644; *Hall v. Wallace*, 83 Cal. 434, 26 Pac. 360; *Castner v. Richardson*, 18 Colo. 496, 33 Pac. 163.

<sup>25</sup> *McLean v. Dunn*, 4 Bing. 722; *Emmerson v. Heelis*, 2 Taunt. 38; *Soames v. Spencer*, 1 Dowl. & R. 32; *Hawkins v. Chace*, 19 Pick. (Mass.) 502, 505; *Batturs v. Sellers*, 5 Har. & J. (Md.) 117, 9 Am. Dec. 492; *Yerby v. Grigsby*, 9 Leigh (Va.) 387; *Conaway v. Sweeney*, 24 W. Va. 643; *Roehl v. Haumesser*, 114 Ind. 311, 15 N. E. 345; *Wiener v. Whipple*, 53 Wis. 298, 302, 10 N. W. 433, 40 Am. Rep. 775 (but see *Simpson v. Com.*, 89 Ky. 412, 12 S. W. 630).

<sup>26</sup> *Pole v. Leask*, 33 L. J. N. S. Ch. 155, 161; *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 16 N. Y. 125, 145, 69 Am. Dec. 678; *Eagle Bank of New Haven v. Smith*, 5 Conn. 71, 13 Am. Dec. 37; *Robinson v. Green's Adm'r*, 5 Har. (Del.) 115; *Kent v. Tyson*, 20 N. H. 123; *Meador v. Page*, 39 Vt. 306; *Matteson v. Blackmer*, 46 Mich. 393, 9 N. W. 445; *Columbia Mill Co. v. National Bank of Commerce*, 52 Minn. 224, 53 N. W. 1061; *Gibson v. Snow Hardware Co.*, 94 Ala. 346, 10 South. 304.

<sup>27</sup> *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 16 N. Y. 125, 69 Am. Dec. 678; *Olcott v. Tioga R. Co.*, 27 N. Y. 546, 560, 84 Am. Dec.

## AGENCY BY ESTOPPEL

4. Where a person, by words or conduct, represents or permits it to be represented that another person is his agent, he will be estopped to deny the agency, as against third persons who have dealt, on the faith of such representation, with the person so held out as agent, even if no agency existed in fact.

It is a general rule that where a person, by words or conduct, causes another to believe in the existence of a certain state of facts, and to act upon that belief, he will be estopped, as against the other and to his prejudice, to allege a different state of facts.<sup>28</sup> Hence, while a person cannot become the agent of another without his consent, the other, if he has represented that an agency exists, may be estopped to deny its existence.<sup>29</sup> The representation may be by words or conduct. To raise an estoppel against the person sought to be charged as principal, it is not necessary that the representation be made with the actual intention that it be acted upon by the other; it is enough if, whatever the real intention, the representation be so made that the other, acting as a reasonable man, will have cause to believe, and does believe, that it is meant to be acted upon, and does act in reliance upon it.<sup>30</sup> The principal may even be estopped where the representation

298; *Johnson v. Stone*, 40 N. H. 197, 201, 77 Am. Dec. 706; *Gulick v. Grover*, 33 N. J. Law, 463, 467, 97 Am. Dec. 728; *Fisher v. Campbell*, 9 Port. (Ala.) 210; *Odiorne v. Maxcy*, 15 Mass. 39; *Walsh v. Pierce*, 12 Vt. 130; *Wheeler v. Benton*, 67 Minn. 293, 69 N. W. 927; *Jacobus v. Jamestown Mantel Co.*, 211 N. Y. 154, 105 N. E. 210.

Recognition of authority in a single instance may be so comprehensive as to be sufficient. *Wilcox v. Chicago, M. & St. P. R. Co.*, 24 Minn. 269. Cf. *Green v. Hinkley*, 52 Iowa, 633, 3 N. W. 688; *Graves v. Horton*, 38 Minn. 66, 35 N. W. 568.

Proof that one has acted for a considerable time as agent is *prima facie* proof of agency, since such conduct would naturally come to the knowledge of the principal, and the absence of dissent justifies the inference that it was authorized. *Neibles v. Minneapolis & St. L. R. Co.*, 37 Minn. 151, 33 N. W. 322; *Rockford, R. I. & St. L. R. Co. v. Wilcox*, 66 Ill. 417; *Singer Mfg. Co. v. Holdfodt*, 86 Ill. 455, 29 Am. Rep. 43; *Reynolds v. Collins*, 78 Ala. 94; *Anderson v. Supreme Council of Order of Chosen Friends*, 135 N. Y. 107, 31 N. E. 1092.

<sup>28</sup> Cf. *Bowstead*, Dig. Ag. art. 8.

<sup>29</sup> *Pickard v. Sears*, 6 Ad. & E. 469; *Bronson v. Chappell*, 12 Wall. (U. S.) 681, 20 L. Ed. 436; *Kirk v. Hamilton*, 102 U. S. 68, 26 L. Ed. 79; *Jacobus v. Jamestown Mantel Co.*, 211 N. Y. 154, 105 N. E. 210.

<sup>30</sup> *Freeman v. Cook*, 2 Ex. 654; *Reynall v. Lewis*, 15 M. & W. 517; *Carr v. London & N. W. Ry. Co.*, L. R. 10 C. P. 307, 317; *Bradish v. Belk-*

of authority is due to his own failure to observe reasonable care.<sup>31</sup> The other party must act in reliance upon the apparent authority and in good faith.<sup>32</sup> This apparent agency, which to this extent is treated as a real agency, has been termed an "agency by estoppel."<sup>33</sup> An agency by estoppel may arise, not only where no agency at all exists, but where an agent has acted in excess of his authority; for if the principal has represented that his agent has authority to perform a particular act, he will be equally estopped to deny the existence of the particular authority. Independently of estoppel, however, the principal may be bound by the contracts and representations of his agent within the scope of the authority usually confided to an agent employed in the capacity in which the agent is employed, or purporting to be within such limits, provided the person dealing with the agent has not notice that he is exceeding his authority.<sup>34</sup>

In most cases of agency by estoppel the representation is based upon the conduct of the alleged principal in holding out another as his agent. And frequently the same evidence which establishes a representation of authority by conduct as the basis of an estoppel is sufficient to establish an agency by implied appointment. Thus, as has been shown,<sup>35</sup> the repeated adoption by the principal of the unauthorized acts of an agent is evidence of authority to the agent to perform other similar acts; and it is open to a person who has dealt with an agent to prove

nap, 41 Vt. 172; *Page v. Methfessel*, 71 Hun, 442, 25 N. Y. Supp. 11; *Sax v. Drake*, 69 Iowa, 760, 28 N. W. 423; *Gibson v. Snow Hardware Co.*, 94 Ala. 346, 10 South. 304; *Johnson v. Hurley*, 115 Mo. 513, 22 S. W. 492.

<sup>31</sup> *Martin v. Webb*, 110 U. S. 7, 3 Sup. Ct. 428, 28 L. Ed. 49; *Columbia Mill Co. v. National Bank of Commerce*, 52 Minn. 224, 53 N. W. 1061; *Quinn v. Dresbach*, 75 Cal. 159, 16 Pac. 762, 7 Am. St. Rep. 138; *Holt v. Schneider*, 57 Neb. 523, 77 N. W. 1086; *Witcher v. Gibson*, 15 Colo. App. 163, 61 Pac. 192.

Where a principal knows that a stranger is dealing with his agent under the belief that all statements of the agent are warranted by the principal, and allows the stranger to expend money in that belief, he will not be allowed to set up the want of authority. *Remsden v. Dyson*, L. R. 1 H. L. 129.

Payment to a person found in a merchant's counting house, and appearing to be intrusted with the business there, is good, though he be not in the merchant's employ. "The debtor has a right to suppose that the tradesman has the control of his own premises, and that he will not allow persons to come there and intermeddle in his business without his authority." Per Lord Tenterden, *Barrett v. Deere*, Moo. & M. 200. See *Mt. Morris Bank v. Gorham*, 169 Mass. 519, 48 N. E. 341.

<sup>32</sup> *Crane v. Gruenewald*, 120 N. Y. 274, 24 N. E. 456, 17 Am. St. Rep. 643; *Clark v. Dillman*, 108 Mich. 625, 66 N. W. 570; *First Nat. Bank of Hastings v. Farmers' & Merchants' Bank*, 56 Neb. 149, 76 N. W. 430.

<sup>33</sup> *Pole v. Leask*, 33 L. J. N. S. Ch. 155, 162; *Anson, Contr.* 335.

<sup>34</sup> *Post*, p. 53.

<sup>35</sup> *Ante*, p. 6.



his authority by such evidence, although he was not aware of the prior course of dealing between principal and agent when he so dealt. If, however, the acts previously adopted by the principal were done in dealings with the person seeking to charge him, so as to amount to a representation of authority made to him, or were so notorious as to amount to a public representation of authority, and he has dealt with the agent in reliance upon such representation, it is immaterial that the principal may be able to overcome the implication of actual authority, since an agency by estoppel has been established.<sup>36</sup>

### AGENCY FROM NECESSITY

5. In certain legal relations, under circumstances of necessity peculiar to the particular relation, the law confers upon one party thereto power to make contracts which are binding upon the other, without his authority, and in some cases against his will.

The term "agency from necessity" is sometimes used to describe relations which are not referable to agreement. Such is the relation between husband and wife, by which, only under particular circumstances, the wife has the power to impose an obligation upon her husband, even against his will, in favor of a third person. It is true that the ordinary powers of an agent are sometimes enlarged by the occurrence of an emergency which justifies action that would otherwise be a departure from or in excess of the authority conferred; but such extraordinary authority is to be implied from the conduct of the principal in creating an agency in which such an emergency may arise, and is hence derived from the will of the principal. In cases where a so-called agency arises, independently of agreement, by operation of law, the relation may be described as agency quasi ex contractu.<sup>37</sup> In other words, the relation is not one which rests upon agreement, but the obligation of the so-called principal is enforced as if an agreement actually existed. Thus, in an action against a husband to recover for necessities furnished to his wife the form of action is *assumpsit*, and the husband's request, although alleged, need not be proved.<sup>38</sup>

Agency of necessity has also been said to exist when a minor child purchases necessities on his father's credit, when a shipmaster sells

<sup>36</sup> *Columbia Mill Co. v. National Bank of Commerce*, 52 Minn. 224, 53 N. W. 1061; *Bradish v. Belknap*, 41 Vt. 172.

<sup>37</sup> *Anson, Contr.* 335.

<sup>38</sup> *Benjamin v. Dockham*, 134 Mass. 418.

or hypothecates ship or cargo, when a railway servant employs a physician on behalf of the railway company for injured employes, and in other cases.<sup>39</sup>

### AGENCY BY RATIFICATION

6. The relation of principal and agent is created by ratification when one person adopts an act done by another person, assuming to act on his behalf, but without authority or in excess of authority, with the same force and effect (subject to the exceptions hereafter stated) as if the relation had been created by appointment.

An act done by one person on behalf of another, even though in the other's name, is not, as a rule, his act, unless done with his assent. Under the doctrine of ratification, however, the assent may be given after as well as before the act, the person on whose behalf the act was done having the right to adopt it as his own, with its benefits and burdens, if he sees fit. Ratification, it is said, relates back, and is equivalent to previous authority. *Omnis ratihabitio retro trahitur et mandato æquiparatur.*<sup>40</sup> This is, of course, a statement, and not an explanation of the doctrine of ratification, which, observes Judge Holmes, "like the rest of the law of agency reposes on a fiction."<sup>41</sup> It is not confined to the relation of principal and agent for one may ratify the act of one who has assumed to act as his servant, and thus become liable for a trespass, or render lawful ab initio an act which, but for the ratification of the person able to justify it, would be a trespass.<sup>42</sup> The creation of an agency by ratification has been likened to the formation of a contract by acceptance of an offer of an act for a promise,<sup>43</sup> but it may be doubted whether the analogy is not misleading, and it is better to disregard the language of contract, and to say simply

<sup>39</sup> Tiff. Ag. p. 41; 31 Cyc. p. 1234.

<sup>40</sup> Co. Litt. 207a. Cf. Y. B. 30 Ed. I (Rolls' Series) 126; Bracton de Leg. f. 171b. As to the origin of the maxim, see Story, Ag. § 239; 5 Harv. Law Rev. 11; Wambaugh, Cas. Ag. 986.

<sup>41</sup> 5 Harv. Law Rev. 14.

<sup>42</sup> Lewis v. Read, 13 M. & W. 834; Bird v. Brown, 4 Ex. 786, per Rolfe, B.; Dempsey v. Chambers, 154 Mass. 330, 28 N. E. 279, 13 L. R. A. 219, 26 Am. St. Rep. 249; Nims v. Mt. Hermon Boys' School, 160 Mass. 177, 35 N. E. 776, 22 L. R. A. 364, 39 Am. St. Rep. 467; Jaggard, Torts, 46.

Doubtless the doctrine of ratification is too broadly stated, which has resulted in some injustice and confusion. Perhaps the true principle is no broader than this: Subsequent assent to the receipt or surrender of a right is equivalent to a prior assent, while the right is still in suspense between the parties.

<sup>43</sup> Anson, Contr. 333.

that the proposed or quasi principal has an election to treat the act as his own or not.<sup>44</sup> It must be borne in mind that the doctrine of ratification applies equally to acts of strangers who have acted without any authority whatever and to acts of agents who in the performance of particular acts have exceeded their authority.

#### *What Acts May be Ratified*

As a rule every act, lawful or unlawful, which is done on behalf of another without his authority, may be ratified, and when ratified is deemed to be his act, with all the burdens and benefits which would have resulted had he previously authorized it. Inasmuch as a man is liable for a tort, as well as upon a contract, if he has authorized it, he is liable if he ratifies it.<sup>45</sup>

To the general rule that whatever acts may be authorized may be ratified with like effect, certain exceptions, growing out of the peculiar nature of ratification, must be noted. In cases involving the rights of strangers which have accrued between the act and the ratification, and in some cases involving the liabilities of third persons with whom the quasi agent has dealt, a strict application of the doctrine of relation would lead to unjust consequences, and in such cases ratification is denied the full effect of prior authority. These exceptions will be dealt with in treating of the effect of ratification.

#### *Assumption of Agency*

No act performed by one man can be adopted by another as his own unless it was done professedly on his behalf. In other words, an act, to be capable of ratification, must, as a rule,<sup>46</sup> be done by one who assumes openly to act as agent.<sup>47</sup>

<sup>44</sup> *Drakeley v. Gregg*, 8 Wall. (U. S.) 242, 267, 19 L. Ed. 409; *Metcalf v. Williams*, 144 Mass. 452, 11 N. E. 700; *Shoninger v. Peabody*, 57 Conn. 42, 17 Atl. 278, 14 Am. St. Rep. 88; *Story*, Ag. § 248; *Mechem*, Ag. (2d Ed.) § 352.

Where a contract is ratified, no new consideration is required. *Drakeley v. Gregg*, supra; *Grant v. Beard*, 50 N. H. 129; *Pearsoll v. Chapin*, 44 Pa. 9; *Lynch v. Smyth*, 25 Colo. 103, 54 Pac. 634.

<sup>45</sup> *Hillberry v. Hatton*, 2 H. & C. 822; *Eastern Counties Ry. Co. v. Brown*, 6 Ex. 314; *Dempsey v. Chambers*, 154 Mass. 330, 28 N. E. 279, 13 L. R. A. 219, 26 Am. St. Rep. 249.

Accepting goods wrongfully seized with knowledge of facts held ratification of assault committed while making seizure, so as to render master liable in punitive damages. *Avakian v. Noble*, 121 Cal. 216, 53 Pac. 559.

Accepting proceeds of wrongful sale of goods stored in principal's warehouse rendered him liable for conversion. *Creson v. Ward*, 66 Ark. 209, 49 S. W. 827.

<sup>46</sup> An exception exists in case of ratification of forgery in jurisdictions where such ratification is sustained. See p. 12.

<sup>47</sup> *Wilson v. Tumman*, 6 M. & G. 236; *Watson v. Swann*, 11 C. B. N. S. 756; *Lyell v. Kennedy*, 18 Q. B. D. 796; *Hamlin v. Sears*, 82 N. Y. 327;

If he professes to act as agent for a designated principal, that, it has been held, is sufficient, even though he secretly intends to act for himself;<sup>48</sup> but, if he professes to act for himself, there can be no ratification, even though he secretly intends to act for another. In other words, an undisclosed principal cannot ratify.<sup>49</sup> Nor can a contract entered into by A., as agent for D., be ratified by B.<sup>50</sup>

### *Ratification of Forgery*

Whether a forged instrument is capable of being ratified by the person whose name is forged, so as to render him liable upon it, is a question upon which the courts are divided.<sup>51</sup> The arguments against rat-

Grund v. Van Vlécck, 69 Ill. 479; Roby v. Cossitt, 78 Ill. 638; Ironwood Store Co. v. Harrison, 75 Mich. 197, 42 N. W. 808; Mitchell v. Minnesota Fire Ass'n, 48 Minn. 278, 51 N. W. 608; Commercial & Agricultural Bank v. Jones, 18 Tex. 811, 825; Rawlings v. Neal, 126 N. C. 271, 35 S. E. 597; Schlessinger v. Forest Products Co., 78 N. J. Law, 637, 76 Atl. 1024, 30 L. R. A. (N. S.) 347, 138 Am. St. Rep. 627.

<sup>48</sup> See *In re Tiedemann* on p. 13, post; also *Hamlin v. Sears*, 82 N. Y. 327; *Ramsay v. Miller*, 202 N. Y. 72, 95 N. E. 35. But where he contracts in his own name, but fraudulently pretends that he is acting as the friend of another and for his benefit, it was held by a divided court that the other could not by ratification take the benefit of the contract. *Garvey v. Jarvis*, 46 N. Y. 310, 7 Am. Rep. 335.

<sup>49</sup> *Keighley v. Durant*, [1901] A. C. 240, reversing *Durant v. Roberts*, [1900] 1 Q. B. 629; *Fradley v. Hyland* (C. C.) 37 Fed. 49, 52, 2 L. R. A. 749; *Ferris v. Snow*, 130 Mich. 254, 90 N. W. 850. And see cases in note 47, ante.

Contra: *Hayward v. Langmaid*, 181 Mass. 426, 63 N. E. 912. And see *Leavitt v. Fairbanks*, 92 Me. 521, 43 Atl. 115.

<sup>50</sup> Where A. entered into an agreement professedly on behalf of B.'s wife and C., B. could not ratify so as to give him a right to sue on it jointly with his wife and C. *Sanderson v. Griffith*, 5 B. & C. 909.

"Where a contract is signed by one who professes to be signing 'as agent,' but who has no principal existing at the time, and the contract would be altogether inoperative unless binding upon the person who signed it, he is bound thereby; and a stranger cannot, by a subsequent ratification, relieve him from that responsibility." *Kelner v. Baxter*, L. R. 2 C. P. 174, per *Earle, C. J.*; *Richardson v. Payne*, 114 Mass. 429.

<sup>51</sup> Against ratification: *Brook v. Hook*, L. R. 6 Ex. 89; *McHugh v. Schuylkill County*, 67 Pa. 391, 5 Am. Rep. 445; *Shisler v. Vandike*, 92 Pa. 449, 37 Am. Rep. 702; *Henry Christian Building & Loan Ass'n v. Walton*, 181 Pa. 201, 37 Atl. 261, 59 Am. St. Rep. 636; *Workman v. Wright*, 33 Ohio St. 405, 31 Am. Rep. 546; *Henry v. Heeb*, 114 Ind. 275, 16 N. E. 606, 5 Am. St. Rep. 613; *Owsley v. Phillips*, 78 Ky. 517, 39 Am. Rep. 258; *Kelchner v. Morris*, 75 Mo. App. 588; *Shinew v. First Nat. Bank*, 84 Ohio St. 297, 95 N. E. 881, 36 L. R. A. (N. S.) 1006, Ann. Cas. 1912C, 587.

In favor of ratification: *President, etc., of Greenfield Bank v. Crafts*, 4 Allen (Mass.) 447; *Wellington v. Jackson*, 121 Mass. 157; *Casco Bank v. Keene*, 53 Me. 103; *Howard v. Duncan*, 3 Lans. (N. Y.) 175; *Living v. Wiler*, 32 Ill. 387; *Hefner v. Vandolah*, 62 Ill. 483, 14 Am. Rep. 106; *Mechem, Ag.* (2d Ed.) § 362; *Wharton, Ag.* § 71. See, also, *Mackenzie v. British Linen Co.*, 6 App. Cas. 82, per Lord Blackburn.

ification are twofold—the first founded upon the circumstance that the forger does not assume to act as agent; the second founded upon public policy.

In answer to the first objection it is suggested that although, as a rule, a man may not ratify an act unless it purports to have been done on his behalf by one who assumes to act as his agent, the principle upon which the rule rests is simply that a man may not ratify an act which did not purport to be his act or done on his behalf.<sup>52</sup> Ordinarily, where one man acts for another, he must act for him professedly, or else the act will purport to be his own act, and not the act of him for whom he is secretly acting. But, from the very nature of forgery, the act upon its face purports to be the act of the person whose name is forged, and this, it seems, is a sufficient basis for his adoption of the act. Thus, if a clerk, without authority, but in the honest belief that he had authority, should sign his employer's name to a check and issue it, without disclosing the fact that the signature was not made by his employer, it can hardly be doubted that the employer could ratify it, although the assumption of agency did not appear. It is submitted that the mere undisclosed intent of the person who makes the signature, although it may make him guilty of forgery, is not a difference which should distinguish the case of forgery from the case last supposed, or which should preclude the person whose signature is forged from ratifying it, unless, indeed, he is precluded on the ground of public policy.

The argument from public policy is based upon the view that ratification of forgery, if it be sanctioned, has a tendency to stifle prosecution for the criminal offense. This tendency cannot be denied,<sup>53</sup> but it may well be doubted whether this consideration should prevail to defeat the ordinary operation of ratification, at least where the ratification is not upon the understanding that the guilty party shall not be prosecuted.<sup>54</sup> Of course, ratification could under no circumstances afford a defense to the forgery against an indictment.<sup>55</sup>

Ratification is not to be confounded with estoppel. There is uni-

<sup>52</sup> The act of one who obtained payment by falsely representing himself as agent of the creditor might be ratified, though the act was a crime. *Scott v. New Brunswick Bank*, 23 Can. Sup. Ct. 277.

Where an agent makes a contract purporting to sell goods for future delivery in the name of a principal, but with the fraudulent intention of selling them on his own account and for his own benefit, the principal may ratify (and take the benefit of the contract). In *re Tiedemann*, [1899] 2 Q. B. 66. The last sentence is questionable. The decision could have rested upon another ground.

<sup>53</sup> *Henry v. Heeb*, 114 Ind. 275, 16 N. E. 606, 5 Am. St. Rep. 613.

<sup>54</sup> *President, etc., of Greenfield Bank v. Crafts*, 4 Allen (Mass.) 447.

<sup>55</sup> *McKenzie v. British Linen Co.*, 6 App. Cas. 82, per Lord Blackburn.

versal agreement that, where a person whose signature has been forged expressly or impliedly represents that it is genuine, he is estopped, as against one who has changed his position for the worse, as by giving value for a negotiable instrument, in reliance upon the representation, from denying its genuineness.<sup>56</sup>

### *Existence of Principal*

The act must be performed on behalf of a quasi principal who is in existence.<sup>57</sup> The most frequent application of this rule arises where the promoters of a proposed corporation enter into a contract on its behalf, intending that the contract shall take effect as its contract after its incorporation. In such case there can be no ratification.<sup>58</sup> The subsequently formed corporation may, indeed, make itself liable by entering into a new contract upon the same terms as the old,<sup>59</sup> or it may make itself liable by accepting the benefits of performance under circumstances which give rise to an implied promise to pay therefor;<sup>60</sup> but such liability does not rest upon ratification and does not relate back.<sup>61</sup> An exception, or an apparent exception, to the rule is recog-

<sup>56</sup> *McKenzie v. British Linen Co.*, 6 App. Cas. 82; *Forsyth v. Day*, 46 Me. 176; *Crout v. De Wolf*, 1 R. I. 393; *Woodruff v. Munroe*, 33 Md. 146; *Rudd v. Matthews*, 79 Ky. 479, 42 Am. Rep. 231; *Continental Nat. Bank v. National Bank of Commonwealth*, 50 N. Y. 575.

<sup>57</sup> "When ratification is admitted the original contract is imputed by a fiction of law to the person ratifying, and the fiction is not allowed to be extended beyond the bounds of possibility. Perhaps there is no solid reason for the rule, but it is an established one." *Pollock, Cont.* (3d Ed.) 118, note c.

"Putting out of view the cases of assignees of bankrupts and administrators, there is no case in which a person can by subsequent ratification make himself liable as principal, so as to discharge the agent, where the principal was not in existence at the time of the original contract." *Scott v. Lord Ebury*, L. R. 2 C. P. 255, 267, per Willes, J.

<sup>58</sup> *Kelner v. Baxter*, L. R. 2 C. P. 174; *Scott v. Lord Ebury*, L. R. 2 C. P. 255; *Re Empress Engineering Co.*, 16 Ch. D. 125; *Re Northumberland Ave. Hotel Co.*, L. R. 33 Ch. D. 16; *Stainsby v. Frazers' Metallic Lifeboat Co.*, 3 Daly (N. Y.) 98; *Abbott v. Hapgood*, 150 Mass. 248, 22 N. E. 907, 5 L. R. A. 586, 15 Am. St. Rep. 193. *Contra*: *Oakes v. Cattaraugus Water Co.*, 143 N. Y. 430, 38 N. E. 461, 26 L. R. A. 544.

<sup>59</sup> *Howard v. Patent Ivory Co.*, 38 Ch. D. 156.

But the new contract may be entered into by mere approval on the part of the corporation. Some courts call it ratification. *Oakes v. Cattaraugus Water Co.*, 143 N. Y. 430, 38 N. E. 461, 26 L. R. A. 544; *Stanton v. New York, etc., E. R. Co.*, 59 Conn. 272, 22 Atl. 300, 21 Am. St. Rep. 110. Others adoption. *McArthur v. Times Printing Co.*, 48 Minn. 319, 51 N. W. 216, 31 Am. St. Rep. 653. See *Mechem, Ag.* (2d Ed.) § 380 et seq.

<sup>60</sup> *Low v. Connecticut & P. R. R.*, 45 N. H. 370; *Bell's Gap R. Co. v. Christy*, 79 Pa. 54, 21 Am. Rep. 39; *McArthur v. Times Printing Co.*, 48 Minn. 319, 51 N. W. 216, 31 Am. St. Rep. 653; *Paxton Cattle Co. v. First Nat. Bank*, 21 Neb. 621, 33 N. W. 271, 59 Am. Rep. 852.

<sup>61</sup> Hence, though a contract made on behalf of a contemplated corporation

nized in the case of contracts made on behalf of estates of deceased or bankrupt persons, where the title of the administrator or assignee in bankruptcy for the protection of the estate vests by relation, and the administrator or assignee, though not yet appointed, existing, as it is said, in contemplation of law, may, when subsequently appointed, ratify the contract.<sup>62</sup>

### *Designation of Principal*

Although the act must be done professedly on behalf of a principal who exists he need not be named or even known to the agent. It is enough if he be capable of being ascertained and be described.<sup>63</sup> Thus, a policy of insurance effected on a vessel on behalf of all persons interested may be ratified by any person who in fact was interested.<sup>64</sup> So, a contract made on behalf of the heirs of A. or the administrator of A.'s estate, though the heirs or administrator be unknown to the person assuming to act on their behalf, may be ratified by them.<sup>65</sup>

### *Who may Ratify*

A person may ratify any act which he would have been competent to authorize, provided he be still competent.<sup>66</sup> Since ratification of an act can have no greater effect than previous authority to do the act, a person who is incompetent cannot ratify.<sup>67</sup> Nor if he was incompetent when the act was done, so that his appointment of an agent would have been void, can he ratify it upon subsequently becoming competent. Thus, in jurisdictions where the appointment of an agent by an infant is void,<sup>68</sup> he cannot ratify upon coming of age,<sup>69</sup> although in jurisdictions where the appointment is merely voidable he may rat-

was within the statute of frauds because by its terms not to be performed within one year, a new contract implied from acceptance of performance by the corporation was not within the statute. *McArthur v. Times Printing Co.*, 48 Minn. 319, 51 N. W. 216, 31 Am. St. Rep. 653.

Agent not relieved from liability, if he was liable on original contract, see p. 101, post.

<sup>62</sup> *Foster v. Bates*, 12 M. & W. 226; *Kelner v. Baxter*, L. R., 2 C. P. 174.

<sup>63</sup> *Watson v. Swann*, 11 C. B. N. S. 756.

<sup>64</sup> *Hagedorn v. Oliverson*, 2 M. & S. 435; *Stillwell v. Staples*, 19 N. Y. 401.

<sup>65</sup> *Foster v. Bates*, 1 D. & L. 400, 12 M. & W. 226; *Lyell v. Kennedy*, 14 App. Cas. 437.

<sup>66</sup> *Armitage v. Widoe*, 36 Mich. 124; *Marsh v. Fulton County*, 10 Wall. (U. S.) 676, 19 L. Ed. 1040.

<sup>67</sup> *Doe v. Roberts*, 16 M. & W. 778; *Armitage v. Widoe*, 36 Mich. 124; *Trueblood v. Trueblood*, 8 Ind. 195, 65 Am. Dec. 756; *Macfarland v. Heim*, 127 Mo. 327, 29 S. W. 1030, 48 Am. St. Rep. 629 (married woman). See, also, *Brady v. Mayor*, etc., of New York, 16 How. Prac. (N. Y.) 432.

<sup>68</sup> Post, p. 30.

<sup>69</sup> *Trueblood v. Trueblood*, 8 Ind. 195, 65 Am. Dec. 756.

ify.<sup>70</sup> Whether an insane person may ratify an unauthorized act after removal of his disability depends likewise upon whether the appointment of an agent by an insane person is voidable or void.<sup>71</sup>

It is said that the principal may not ratify a contract unless he have present ability to perform it; for example, that a principal may not ratify a contract for the sale of land if he has already conveyed the land to a stranger.<sup>72</sup> Undoubtedly he cannot by ratifying defeat the rights of his grantee.<sup>73</sup> But it seems that he may nevertheless, if he sees fit, ratify the contract, thereby making himself liable to the other party for the result of nonperformance, and to the agent, as in other cases of ratification; in other words, that he may ratify, but that the retrospective effect of the ratification will be limited by the rights which have intervened.<sup>74</sup>

### *How an Act may be Ratified*

Ratification is, as we have seen, the exercise of a right of election on the part of the quasi principal to adopt as his own an act done on his behalf. It is therefore an assent to accept the benefits and burdens of the act. It follows that the ratification must be of the act as a whole, or in toto, with all its burdens, or not at all.<sup>75</sup> This principle is illustrated by the rule that any conduct of the principal, with knowledge of the facts, in recognition of the transaction, is a ratification.<sup>76</sup> Since ratification rests upon assent it is ordinarily necessary that the person

<sup>70</sup> *Coursolle v. Weyerhauser*, 69 Minn. 328, 72 N. W. 697.

<sup>71</sup> *Post*, p. 31.

<sup>72</sup> *McCracken v. City of San Francisco*, 16 Cal. 591, per Field, C. J.; *McDonald v. McCoy*, 121 Cal. 55, 53 Pac. 421; *Dobbs v. Atlas Elevator Co.*, 22 S. D. 226, 117 N. W. 128.

<sup>73</sup> *Post*, p. 22.

<sup>74</sup> *Cook v. Tullis*, 18 Wall. (U. S.) 332, 21 L. Ed. 933, per Field, J.

Insurance may be ratified after knowledge of loss, although principal could not then insure. *Post*, p. 25.

<sup>75</sup> *Hovil v. Pack*, 7 East, 164; *Bristow v. Whitmore*, 9 H. L. Cas. 391; *Gaines v. Miller*, 111 U. S. 395, 4 Sup. Ct. 426, 28 L. Ed. 466; *Teague v. Mad-dox*, 150 U. S. 128, 14 Sup. Ct. 46, 37 L. Ed. 1025; *Brigham v. Palmer*, 3 Allen (Mass.) 450; *Shoninger v. Peabody*, 57 Conn. 42, 17 Atl. 278, 14 Am. St. Rep. 88; *Billings v. Mason*, 80 Me. 496, 15 Atl. 59; *Southern Exp. Co. v. Palmer*, 48 Ga. 85; *Eberts v. Selover*, 44 Mich. 519, 7 N. W. 225, 38 Am. Rep. 278; *Nye v. Swan*, 49 Minn. 431, 52 N. W. 39; *Wells v. Hickox*, 1 Kan. App. 485, 40 Pac. 821; *Key v. National Life Ins. Co.*, 107 Iowa, 446, 78 N. W. 68; *Looschen Piano Case Co. v. Steinberg*, 76 N. J. Law, 130, 68 Atl. 1072; *Bodine v. Berg*, 82 N. J. Law, 662, 82 Atl. 901, 40 L. R. A. (N. S.) 65, Ann. Cas. 1913D, 721. *Fairchild v. McMahon*, 139 N. Y. 290, 34 N. E. 779, 36 Am. St. Rep. 701.

<sup>76</sup> Accepting benefits. *Smith v. Barnard*, 148 N. Y. 420, 42 N. E. 1054.

Bringing suit. *Clews v. Jamieson*, 182 U. S. 462, 21 Sup. Ct. 845, 45 L. Ed. 1183; *City of Worcester v. Worcester & H. St. R. Co.*, 194 Mass. 228, 80 N. E.



ratifying have knowledge of the facts, for otherwise the assent is only apparent, and not real, and the ratification will not be binding upon him unless he intended to ratify whatever the facts might turn out to be.<sup>77</sup> The assent of the principal may be shown by words or by conduct; or, in other words, it may be express or implied.<sup>78</sup> No formalities are requisite. The only exception to this rule is that, where an act is one which could have been authorized only by observance of a particular form, that form must be observed to effect a ratification.<sup>79</sup>

Although a ratification once made is irrevocable,<sup>80</sup> the mere fact that the principal at first refuses to recognize an unauthorized act does

232; *German American Bank v. Schwinger*, 75 App. Div. 393, 78 N. Y. Supp. 38.

Accepting from the agent security against loss which might result from an unauthorized act was not ratification. *Lazard v. Merchants' & Miners' Transp. Co.*, 78 Md. 1, 26 Atl. 897.

The owner of a building did not become liable for improvements made under an unauthorized contract with his agent, because he afterwards used them, where they were of such a character that they could not be removed. *Mills v. Berla* (Tex. Civ. App.) 23 S. W. 910. See, also, *Foot v. Cotting*, 195 Mass. 55, 80 N. E. 600, 15 L. R. A. (N. S.) 693; *Weatherford, M. W. & N. W. Ry. Co. v. Granger*, 86 Tex. 350, 24 S. W. 795, 40 Am. St. Rep. 837.

<sup>77</sup> *Meehan v. Forrester*, 52 N. Y. 277; *The Henrietta* (D. C.) 91 Fed. 675; *Busch v. Wilcox*, 82 Mich. 336, 47 N. W. 328, 21 Am. St. Rep. 563; *State Bank of Tabor v. Kelly*, 109 Iowa, 544, 80 N. W. 520; *Glor v. Kelly*, 49 App. Div. 617, 63 N. Y. Supp. 339; *Murray v. Nelson Lumber Co.*, 143 Mass. 250, 9 N. E. 634; *Schmidt v. Garfield Nat. Bank*, 64 Hun, 298, 19 N. Y. Supp. 252, affirmed 138 N. Y. 631, 33 N. E. 1084.

Where a principal, knowing that an unauthorized lease had been made in his behalf, entered into possession and enjoyed the use of the premises without knowing or ascertaining the terms of the lease, he must be held to have intended to ratify the lease, whatever it might be. *Ehrmanntraut v. Robinson*, 52 Minn. 333, 54 N. W. 188.

The principal is not chargeable with information which his means of knowledge disclosed, if not willfully ignorant. *Shepard & Morse Lumber Co. v. Eldridge*, 171 Mass. 516, 51 N. E. 9, 41 L. R. A. 617, 68 Am. St. Rep. 446. But see *Eadie v. Ashbaugh*, 44 Iowa, 519.

The principal cannot escape liability by purposely closing his eyes. *Lynch v. Smyth*, 25 Colo. 103, 54 Pac. 634; *Pope v. J. K. Armsby Co.*, 111 Cal. 159, 43 Pac. 589.

Where a principal authorized an agent to sell stock, expressly reserving the right to a dividend, and the agent sold, agreeing that the dividend should go with the stock, and the owner received the exact amount for which he had authorized the stock to be sold, without knowledge of the agreement, retaining the proceeds was not a ratification. *Wheeler v. Northwestern Sleigh Co.* (C. C.) 39 Fed. 347. See, also, *Long v. Poth*, 16 Misc. Rep. 85, 37 N. Y. Supp. 670.

<sup>78</sup> See Tiff. Ag. p. 64.

<sup>79</sup> Post, p. 19.

<sup>80</sup> Post, p. 21.

not prevent him from afterwards ratifying,<sup>81</sup> provided the other party has not acted upon the refusal.<sup>82</sup>

*Same—Acquiescence—Silence*

While an unauthorized act cannot take effect as the act of the principal unless it be ratified, it is evident that his failure to express dissent upon being informed of a transaction may reasonably give ground for inferring assent. If, for example, an agent should make an unauthorized sale of his principal's property, and the principal, after being informed, should remain silent, knowing that the purchaser was dealing with the property as his own, the principal's silence would speak his assent as clearly as words.<sup>83</sup> And, notwithstanding that the principal may not have knowledge that third persons are acting upon the assumption that the agent's act was authorized, it is evident that he will under most circumstances, as a reasonable man, upon being informed of an assumption of authority, express his dissent if he does not intend to adopt the transaction, and that his mere silence is evidence of ratification. Such evidence is, of course, not so strong in the case of an act done by a mere stranger who has volunteered to act in another's behalf as in the case of an agent who has exceeded his authority.<sup>84</sup> Where, however, the relation of principal and agent already exists, the rule is established that failure to repudiate within a reasonable time after being informed of an act done in excess of authority is conclusive evidence of ratification.<sup>85</sup> But in every case the question is whether, under all the circumstances, the inference of ratification may reasonably be drawn from the principal's silence.<sup>86</sup>

<sup>81</sup> *Soames v. Spencer*, 1 D. & R. 32; *Woodward v. Harlow*, 28 Vt. 338; *Warder, Bushnell & Glessner Co. v. Cuthbert*, 99 Iowa, 681, 68 N. W. 917.

<sup>82</sup> *Wilkinson v. Harwell*, 13 Ala. 660. See *Fiske v. Holmes*, 41 Me. 441; *Warder, Bushnell & Glessner Co. v. Cuthbert*, supra.

<sup>83</sup> *Hall v. Harper*, 17 Ill. 82; *Swartwout v. Evans*, 37 Ill. 442; *Alexander v. Jones*, 64 Iowa, 207, 19 N. W. 913; *Baldwin Fertilizer Co. v. Thompson*, 106 Ga. 480, 32 S. E. 591.

<sup>84</sup> *Story*, Ag. § 256; *Mechem*, Ag. (2d. Ed.) § 468.

<sup>85</sup> *Merritt v. Bissell*, 155 N. Y. 396, 50 N. E. 280; *Prince v. Clark*, 2 D. & R. 266; *Law v. Cross*, 1 Black (U. S.) 533, 17 L. Ed. 185; *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 96 U. S. 640, 24 L. Ed. 648; *Norris v. Cook*, 1 Curt. (U. S.) 464, Fed. Cas. No. 10,305; *Abbe v. Rood*, 6 McLean (U. S.) 106, Fed. Cas. No. 6; *Brigham v. Peters*, 1 Gray (Mass.) 139; *Johnson v. Wingate*, 29 Me. 404; *Curry v. Hale*, 15 W. Va. 875; *Bray v. Gunn*, 53 Ga. 144; *Mobile & M. Ry. Co. v. Jay*, 65 Ala. 113; *Clay v. Spratt*, 7 Bush (Ky.) 334; *Booth v. Wiley*, 102 Ill. 84; *Cooper v. Mulder*, 74 Mich. 374, 41 N. W. 1084; *Cooper v. Schwartz*, 40 Wis. 54; *Saveland v. Green*, Id. 431; *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 565; *E. Bement & Sons v. Armstrong* (Tenn. Ch. App.) 39 S. W. 899; *Smith v. Holbrook*, 99 Ga. 256, 25 S. E. 627; *Hartlove v. William Fait Co.*, 89 Md. 254, 43 Atl. 62.

<sup>86</sup> *Philadelphia, W. & B. R. Co. v. Cowell*, 28 Pa. 329, 70 Am. Dec. 128;

The rule is sometimes placed upon the ground of equitable estoppel,<sup>87</sup> and clearly the principle of estoppel is applicable where third persons have acted to their prejudice in reliance upon the apparent assent; but the rule is broader than that of equitable estoppel, as the latter is commonly stated, for it is irrespective of whether or not the other party has actually been prejudiced or misled by the delay.<sup>88</sup>

### *Same—Ratification of Deed*

As we have seen, at common law an agent can be appointed to execute an instrument under seal only by instrument of like character.<sup>89</sup> Ratification cannot stand upon a higher ground than original authority, and if the act must be under seal the ratification also must be under seal.<sup>90</sup> Many cases, however, hold that there may be ratification by estoppel,<sup>91</sup> which often differs not at all from a parol ratification. A

*Heyn v. O'Hagen*, 60 Mich. 150, 26 N. W. 861; *Saveland v. Green*, 40 Wis. 431. See, also, *Ladd v. Hildebrandt*, 27 Wis. 135, 9 Am. Rep. 445; *Harrod v. McDaniels*, 126 Mass. 413; *Myers v. Mutual Life Ins. Co.*, 32 Hun (N. Y.) 321; *Merritt v. Bissell*, 155 N. Y. 396, 50 N. E. 280; *Dugan v. Lyman* (N. J. Sup.) 23 Atl. 657.

A question for the jury unless the inference is plain. *Mechem, Ag.* (2d Ed.) § 453. See *Ramsay v. Miller*, 202 N. Y. 72, 95 N. E. 35.

<sup>87</sup> *Smith v. Fletcher*, 75 Minn. 189, 77 N. W. 800. See *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159; *Montwill v. American Locomotive Co.*, 173 App. Div. 387, 159 N. Y. Supp. 21.

<sup>88</sup> Cases cited *supra*, notes 19 and 20; *Mechem, Ag.* (2d Ed.) § 456.

In *Bigg v. Stone*, 3 Sm. & Gif. 592, where a son, who usually acted as agent for his father, without authority sold his interest in land, the court said: "It is clearly established that the father had full notice of the agreement, if not immediately or on the same day, yet certainly within five days after the agreement was signed. It cannot be considered that any express act on his part, such as signature of the agreement by himself or any other solemnity by him after he became privy to the act done by his son on his behalf, was essentially necessary. Subject to his right to a reasonable opportunity to express his dissent, every additional day and hour of silence after he became privy to the contract operates as a tacit acquiescence, and raises the presumption of assent." *Philadelphia, W. & B. R. Co. v. Cowell*, 28 Pa. 329, 70 Am. Dec. 128; *Lynch v. Smyth*, 25 Colo. 103, 54 Pac. 634; *Stiebel v. Haigney*, 134 App. Div. 516, 119 N. Y. Supp. 455.

The limits of estoppel are no more clearly understood than the limits of ratification. Certainly assent in ratification, or in other connections, need not be actual; merely permitting the other party to believe there is assent is enough. See *Smith v. Hughes*, L. R. 6 Q. B. 597, and comments on this case in *Anson* and in *Clark on Contracts*.

<sup>89</sup> *Ante*, p. 5.

<sup>90</sup> *Spofford v. Hobbs*, 29 Me. 148, 48 Am. Dec. 521; *Heath v. Nutter*, 50 Me. 378; *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203; *Blood v. Goodrich*, 12 Wend. (N. Y.) 525, 27 Am. Dec. 152; *Grove v. Hodges*, 55 Pa. 504; *Pollard v. Gibbs*, 55 Ga. 45; *Zimpelman v. Keating*, 72 Tex. 318, 12 S. W. 177. See *Oxford v. Crowe*, [1893] 3 Ch. 535.

<sup>91</sup> *Hyatt v. Clark*, 118 N. Y. 563, 23 N. E. 891; 2 Corpus Juris, p. 487.

"If the principal adopt the sale and receive the purchase money with full

ratification under seal may be effected by an instrument in terms ratifying the deed, or by a power of attorney prospective in terms, authorizing the deed, but dated back to a period anterior to the execution of the deed it is intended to ratify.<sup>92</sup> As in case of appointment,<sup>93</sup> if it was not essential that the instrument ratified should be under seal, the seal, though attached, being superfluous, may be disregarded, and a parol ratification is sufficient.<sup>94</sup> An exception to the rule is generally recognized in cases of partnership, where it is held that one partner may ratify by parol a deed executed by another in the name of the firm.<sup>95</sup> In Massachusetts the court has extended the doctrine of parol ratification to all classes of cases;<sup>96</sup> and a few other courts appear likewise to ignore the rule.<sup>97</sup>

*Same—Writing Not under Seal—Statute of Frauds*

At common law all contracts which are not specialties may be ratified, as they may be authorized, by parol. But, where a statute enacts that the authority must be in writing, the ratification must be in like form.<sup>98</sup>

knowledge of the facts, it would be a ratification by estoppel." *Zimpelman v. Keating*, per Collard, J., *supra*. Cf. *Grove v. Hodges*, *supra*.

Where a wife executed a deed in blank as to the name of the grantee, the date and consideration, and delivered it to her husband, who filled the blanks and delivered it to defendant as grantee, and she knowingly used the consideration, she thereby ratified the conveyance. *Reed v. Morton*, 24 Neb. 760, 40 N. W. 282, 1 L. R. A. 736, 8 Am. St. Rep. 247. As to authority to fill blanks, see *Tiffany*, Ag. p. 23.

<sup>92</sup> *Millikin v. Coombs*, 1 Greenl. (Me.) 343, 10 Am. Dec. 70; *Riggan v. Crain*, 86 Ky. 249, 5 S. W. 561. See, also, *Rice v. McLaren*, 42 Me. 157. *Contra*: *Moore v. Lockett*, 2 Bibb (Ky.) 67, 4 Am. Dec. 683.

<sup>93</sup> *Ante*, p. 5.

<sup>94</sup> *Worrall v. Munn*, 5 N. Y. 229, 238, 55 Am. Dec. 330; *State v. Spartanburg & U. R. Co.*, 8 S. C. 129; *Adams v. Power*, 52 Miss. 828; *Hammond v. Hannin*, 21 Mich. 374, 4 Am. Rep. 490; *Lynch v. Smyth*, 25 Colo. 103, 54 Pac. 634. *Contra*: *Pollard v. Gibbs*, 55 Ga. 45; *Neely & Co. v. Stevens*, 138 Ga. 305, 75 S. E. 159.

<sup>95</sup> *Cady v. Shepherd*, 11 Pick. (Mass.) 400, 22 Am. Dec. 379; *Skinner v. Dayton*, 19 Johns. (N. Y.) 513, 10 Am. Dec. 286; *Peine v. Weber*, 47 Ill. 45.

<sup>96</sup> *McIntyre v. Park*, 11 Gray (Mass.) 102, 71 Am. Dec. 690; *Holbrook v. Chamberlin*, 116 Mass. 155, 17 Am. Rep. 146.

<sup>97</sup> *Finch v. Gillespie*, 122 App. Div. 858, 107 N. Y. Supp. 418; *Hyatt v. Clark*, 118 N. Y. 563, 23 N. E. 891 (ratification and estoppel); *Donason v. Barbero*, 230 Ill. 138, 82 N. E. 620; *Mulford v. Rowland*, 45 Colo. 172, 100 Pac. 603; *Eastham v. Hunter*, 102 Tex. 145, 114 S. W. 97, 132 Am. St. Rep. 854.

<sup>98</sup> *McDowell v. Simpson*, 3 Watts (Pa.) 129, 27 Am. Dec. 338; *Goss v. Stevens*, 32 Minn. 472, 21 N. W. 549; *Kozel v. Dearlove*, 144 Ill. 23, 32 N. E. 542, 36 Am. St. Rep. 416; *Hawkins v. McGroarty*, 110 Mo. 550, 19 S. W. 830; *Long v. Poth*, 16 Misc. Rep. 85, 37 N. Y. Supp. 670; *Carman v. Fox*, 86 Misc. Rep. 197, 149 N. Y. Supp. 213 (but see New York cases *contra*); *Ragan v. Chenault*, 78 Ky. 545; *Harper & Bro. Co. v. Jackson*, 240 Pa. 312, 87 Atl. 430; *Clement v.*

## EFFECT OF RATIFICATION

7. The effect of ratification is by relation to invest the person on whose behalf the act ratified was done, the person who did the act, and third persons with the same rights and duties as if the act had been done with the previous authority of the person ratifying, subject to certain exceptions, where the application of the fiction involved in the doctrine of relation would work an injustice.

*Ratification Irrevocable*

An election to ratify once made is irrevocable.<sup>99</sup> If the principal adopts the act for a moment he is bound.<sup>1</sup> This statement is, of course, subject to the qualification that the ratification must be made with knowledge of the facts, or else must be made with the intention to ratify whatever the facts may be; for otherwise the principal may disavow the ratification upon being informed of the facts.<sup>2</sup>

*Doctrine of Relation*

By the doctrine of relation, the principal, the agent, and the person with whom the agent dealt are, upon ratification, as a rule, invested with the same rights and duties as if the act ratified had been authorized. "Omnis ratihabitio retro trahitur et mandato æquiparatur." Yet while it is the rule that ratification relates back and is equivalent to previous authority, there are many cases in which ratification is in fact far from being equivalent to previous authority, and in which a strict application of the doctrine of relation would lead to absurd and unjust results. To apply the doctrine in such cases would be to adhere to a legal fiction at the expense of facts and plain justice, and the law accordingly recognizes many exceptions to the rule.<sup>3</sup> These exceptions may properly be dealt with in treating of the effect of ratification, for the question is not what acts are capable of ratification, but, rather,

Young-McShea Amusement Co., 70 N. J. Eq. 677, 67 Atl. 82, 118 Am. St. Rep. 747. Contra: Hammond v. Hannin, 21 Mich. 374, 4 Am. Rep. 490; Kirkpatrick v. Pease, 202 Mo. 471, 101 S. W. 651; Hyatt v. Clark, 118 N. Y. 563, 23 N. E. 891 (ratification and estoppel); In re Di Marti, 72 Misc. Rep. 148, 129 N. Y. Supp. 81.

<sup>99</sup> Smith v. Cologan, 2 T. R. 188, note; Jones v. Atkinson, 68 Ala. 167; Brock v. Jones' Ex'r, 16 Tex. 461; Sanders v. Peck, 30 C. C. A. 530, 87 Fed. 61; Hazelton v. Batchelder, 44 N. H. 40; Mutual Auto Accessories Co. of America v. Beard, 59 Misc. Rep. 174, 110 N. Y. Supp. 416; Kirkpatrick v. Pease, 202 Mo. 471, 101 S. W. 651.

As to ratification after disapproval, see ante, p. 17.

<sup>1</sup> Smith v. Cologan, 2 Term R. 188, note.

<sup>2</sup> Ante, p. 16.

<sup>3</sup> 9 Harv. Law Rev. 60; 5 Harv. Law Rev. 19.

what are the limitations upon the doctrine of relation in its effect upon the rights and duties of the different persons concerned, when ratification actually takes place.

*Effect of Ratification—Intervening Rights of Strangers*

An obvious limitation upon the doctrine of relation is that it cannot be allowed to defeat rights of strangers which have accrued between the act and the ratification.<sup>4</sup> Thus the principal cannot, by ratifying an unauthorized contract of sale, defeat an intermediate sale of the property made by himself,<sup>5</sup> or defeat intervening liens acquired by attachment or judgment upon the property.<sup>6</sup>

It does not follow, however, that the ratification, although its effect is thus partially defeated by the intervention of superior rights, is totally inoperative. There is no reason why one who sees fit to ratify an unauthorized contract of sale, although he has in the meantime conveyed the property to a stranger, cannot be held to respond in damages to the other party to the contract, and to indemnify and compensate the agent.<sup>7</sup>

*Same—Between Principal and Third Party*

The transaction ratified may be a mere act or it may be a contract. In both cases the doctrine of relation applies without exception, so far as concerns the binding force of the ratification upon the principal. In its effect upon the obligations of the other party, however, the doctrine of relation is not universally applicable.<sup>8</sup>

(a) *Acts Other Than Contracts.* Where an unauthorized act is of such a nature that it would, if authorized, create a right in favor of the principal to have some act performed by a third person, the performance of which, in the absence of authority on the part of the as-

<sup>4</sup> Lord Audley v. Pollard, Cro. Eliz. 561; Donnelly v. Popham, 1 Taunt. 1; Bird v. Brown, 4 Ex. 786; Lyell v. Kennedy, 18 Q. B. D. 796; Cook v. Tullis, 16 Wall. (U. S.) 332, 21 L. Ed. 933; McCracken v. City of San Francisco, 16 Cal. 624; Wood v. McCain, 7 Ala. 806, 42 Am. Dec. 612; Pollock v. Cohen, 32 Ohio St. 514; McMahan v. McMahan, 13 Pa. 376, 53 Am. Dec. 481; Stoddart's Case, 4 Ct. Cl. (U. S.) 511; Clendenning v. Hawk, 10 N. D. 90, 86 N. W. 114; Graham v. Williams, 114 Ga. 716, 40 S. E. 790.

<sup>5</sup> Parmelee v. Simpson, 5 Wall. (U. S.) 81, 18 L. Ed. 542; McCracken v. City of San Francisco, 16 Cal. 624; McDonald v. McCoy, 121 Cal. 55, 53 Pac. 421.

<sup>6</sup> Wood v. McCain, 7 Ala. 806, 42 Am. Dec. 612; Taylor v. Robinson, 14 Cal. 396; Pollock v. Cohen, 32 Ohio St. 514; Norton v. Alabama Nat. Bank, 102 Ala. 420, 14 South. 872; Simon v. Sevier Ass'n, 54 Ark. 58, 14 S. W. 1101.

Where an agent to collect an account takes a deed of land therefor without authority, and after recording, but before ratification, the land is attached by another creditor, his rights are not defeated by the ratification. Kempner v. Rosenthal, 81 Tex. 12, 16 S. W. 639.

<sup>7</sup> See Lyell v. Kennedy, 14 App. Cas. 437.

<sup>8</sup> Story, Ag. § 245.

sumed agent, would be unnecessary, it is manifestly unjust to give to ratification the effect of previous authority, so as to subject the third person, if he fails to perform, to the consequences which would have resulted from nonperformance had the act of the assumed agent been authorized; " for the third person, in such a case, is obliged to perform at his own risk, and will be without protection if the principal disavows the act. The courts have frequently recognized an exception to the doctrine of relation in such cases, although the exception is not clearly defined or universally recognized.<sup>10</sup> Thus, it has been held that an unauthorized notice to quit does not become binding upon a tenant by ratification,<sup>11</sup> at least if he fails to act upon it.<sup>12</sup> So, it seems, an unauthorized demand, though ratified, will not support an action, for the other party has a right to know whether he may safely pay or deliver to the person making demand.<sup>13</sup> On the other hand, it has been held

<sup>9</sup> Story, Ag. § 246. See 5 Harv. Law Rev. 19; 9 Harv. Law Rev. 60; Wright, Prin. & Ag. (2d Ed.) p. 75; Mechem, Ag. (2d Ed.) § 528.

<sup>10</sup> Mr. Wharton suggests the uncertain test of "moral" certainty. "In all cases in which it is morally sure the principal will ratify, other parties are bound to treat the intervener—the negotiorum gestor—as an agent. In cases where the ratification of the principal may be regarded as doubtful, the intervener may be treated as a mere interloper." Wharton, Ag. § 80. This distinction is approved in *Farmers' Loan & Trust Co. v. Memphis & C. R. Co.* (C. C.) 83 Fed. 870, in which case the facts were as follows: Under a provision in a railroad mortgage that, on default in payment of any installment of interest, continuing for 60 days, the holders of one-third in amount of the bonds secured might declare the principal due, by an instrument executed by them "or their attorneys in fact thereto duly authorized," and delivered to the trustee, such a declaration of maturity was signed by a person as attorney in fact of his wife and two brothers, who were bondholders. He had no written authority, but an instrument ratifying his act was executed by the persons for whom he acted after the filing of a bill of foreclosure by the trustees. Held, that such ratification rendered effective the act of the attorney as against the mortgagor and a second mortgagee. Lurton, J., after referring to Mr. Wharton's distinction, said: "Applying this to the defendants, they must be regarded as bound by the ratification, which in view of the relationship borne by D. Willis James to those he assumed to represent, and the obvious interest they have in ratifying what he did, can be no surprise to them." See *Johnson v. Johnson* (C. C.) 31 Fed. 700, 702.

<sup>11</sup> *Right v. Cuthell*, 5 East, 491; *Doe v. Walters*, 10 B. & C. 626; *Doe v. Goldwin*, 2 Q. B. 143; *Brahn v. Jersey City Forge Co.*, 38 N. J. Law, 74; *Pickard v. Perley*, 45 N. H. 188, 86 Am. Dec. 153. Contra: *Roe v. Pierce*, 2 Camp. 96; *Goodtitle v. Woodward*, 3 B. & Ald. 689.

<sup>12</sup> In cases which would otherwise fall within this exception, if the third person recognizes the assumed authority, clearly the reason for denying full effect to a subsequent ratification fails.

<sup>13</sup> *Solomons v. Dawes*, 1 Esp. 83; *Coore v. Calloway*, 1 Esp. 115; *Coles v. Bell*, 1 Camp. 478, note; Story, Ag. § 247.

But it has been held that bringing suit founded on an unauthorized demand is a ratification, and that the demand is sufficient unless the authority

that the bringing of an action may be subsequently ratified by the party on whose behalf it is brought,<sup>14</sup> although some courts, with what appears to be the better reason, have held that the principal cannot, by ratification, take away from the defendant a defense which he had at the commencement of the action.<sup>15</sup>

(b) *Contracts.* The effect of ratification of a contract is to invest the principal with all the obligations of an original party to it.<sup>16</sup> The third party may enforce the contract, and has all the incidental rights that he would possess had the person actually dealing with him been the principal himself.

By a reasonable application of the doctrine of ratification, as commonly stated, it should follow that, upon the election of the principal to adopt a contract made on his behalf, the third party becomes bound for its performance. The authorities are not agreed, however, upon this proposition, and some cases have held that since mutual assent is essential to a contract it cannot rest with the party ratifying to bind the other party to an executory contract, and that he can be bound

to make it was brought in question by the party sought to be charged at the time. *Ham v. Boody*, 20 N. H. 411, 51 Am. Dec. 235; *Payne v. Smith*, 12 N. H. 34; *Town of Grafton v. Follansbee*, 16 N. H. 450, 41 Am. Dec. 736. Notice of dishonor of a bill or note by a stranger, though ratified, does not bind a drawer or indorser. *Stewart v. Kennett*, 2 Camp. 177; *Chanoine v. Fowler*, 3 Wend. (N. Y.) 173; *East v. Smith*, 16 L. J. Q. B. 292.

<sup>14</sup> *Ancona v. Marks*, 7 H. & N. 686; *Marr v. Plummer*, 3 Greenl. (Me.) 73; *Persons v. McKibben*, 5 Ind. 261, 61 Am. Dec. 85. See, also, *Farmers' Loan & Trust Co. v. Memphis & C. R. Co.* (C. C.) 83 Fed. 870.

Where the holder of a bill indorsed it, and delivered it to a solicitor, who at his request brought suit on it in the name of *Ancona*, it was held that his ratification after suit begun entitled him to maintain the action. *Ancona v. Marks*, *supra*.

<sup>15</sup> *Wittenbrock v. Bellmer*, 57 Cal. 12; *Dingley v. McDonald*, 124 Cal. 682, 57 Pac. 574.

Civ. Code Prac. Ky. § 550, providing that, in the absence of the plaintiff, the affidavit required by the statute for a writ of attachment may be made by his agent or attorney, intends an existing relation at the time the affidavit is filed, and ratification subsequent to issuance of the writ will not sustain it. *Johnson v. Johnson* (C. C.) 31 Fed. 700.

Ratification of unauthorized signing of plaintiff's name to an attachment bond does not relate back so as to sustain the attachment. *Grove v. Harvey*, 12 Rob. (La.) 221. Contra: *Dove v. Martin*, 23 Miss. 588; *Bank of Augusta v. Conrey*, 28 Miss. 667; *Mandel v. Peet*, 18 Ark. 236; *Hutchinson v. Smith*, 86 Mich. 145, 48 N. W. 1090.

<sup>16</sup> *Fleckner v. Bank of United States*, 8 Wheat. (U. S.) 338, 5 L. Ed. 631; *Bronson v. Chappell*, 12 Wall. (U. S.) 681, 20 L. Ed. 436; *Starks v. Sikes*, 8 Gray (Mass.) 609, 69 Am. Dec. 270; *Lawrence v. Taylor*, 5 Hill (N. Y.) 107; *Hankins v. Baker*, 46 N. Y. 666; *United States Express Co. v. Rawson*, 106 Ind. 215, 6 N. E. 337.



only by some act signifying his present consent to be bound.<sup>17</sup> The objection to this reasoning, it is said, lies in applying to the anomalous doctrine of ratification the test of mutual assent. It is true that until ratification the contract is not binding because of the absence of assent on the part of the assumed principal, but by ratifying the contract he assents to it, and the assent then becomes mutual and the contract by relation mutually binding as of the date it was entered into by the assumed agent.<sup>18</sup>

*Same—Withdrawal of Other Party before Ratification*

A question closely connected with that discussed in the last paragraph is whether the other party to an unauthorized contract may withdraw from it before ratification. In jurisdictions where it is held that the assent of the other party to be bound by the contract, even after ratification, is requisite, the question is, of course, answered in the affirmative. In England, on the other hand, the doctrine of relation has recently been pushed to an extreme limit, and it has been held that ratification by the assumed principal is effective to bind the other party to the contract notwithstanding that he has in the meantime withdrawn his assent.<sup>19</sup> The effect of this decision is that between the

<sup>17</sup> Dodge v. Hopkins, 14 Wis. 630; Atlee v. Bartholomew, 69 Wis. 43, 33 N. W. 110, 5 Am. St. Rep. 103. Cf. Townsend v. Corning, 23 Wend. (N. Y.) 435; Wilkinson v. Heavenrich, 58 Mich. 574, 26 N. W. 139, 55 Am. Rep. 708; Atlanta Buggy Co. v. Hess Springs & Axle Co., 124 Ga. 338, 52 S. E. 613, 4 L. R. A. (N. S.) 431.

This doctrine is supported in 24 Am. Law Rev. 580. It is adversely criticised in Atlee v. Bartholomew, 5 Am. St. Rep. 113, note (s. c. 69 Wis. 43, 33 N. W. 110); 25 Am. Law Rev. 74; 9 Harv. Law Rev. 60.

<sup>18</sup> McClintock v. South Penn. Oil Co., 146 Pa. 144, 23 Atl. 211, 28 Am. St. Rep. 785; post, p. 26.

In Hagedorn v. Oliverson, 13 East, 274, where plaintiff, without authority, procured an insurance upon a ship for the benefit of the owner, who ratified after a loss had occurred and was known, it was held that an action was maintainable on the policy for his benefit. See, also, Routh v. Thompson, 13 East, 274; Finney v. Fairhaven Ins. Co., 5 Metc. (Mass.) 192, 38 Am. Dec. 397; Stillwell v. Staples, 19 N. Y. 401; Williams v. North China Ins. Co., 1 C. P. D. 757; Boutwell v. Globe & Rutgers Fire Ins. Co., of City of New York, 193 N. Y. 323, 85 N. E. 1087, rehearing denied, 193 N. Y. 684, 87 N. E. 1115.

These cases are exceptional, in that they give full effect to the ratification notwithstanding that the principal would not then be able to make the same contract as that ratified. In Williams v. North China Ins. Co., supra, the rule which they establish with regard to marine insurance was sustained by Cockburn, C. J., both on the ground of stare decisis, and as a legitimate exception from the general rule, because "where an agent effects an insurance subject to ratification the loss insured against is very likely to happen before ratification, and it must be taken that the insurance so effected involves that possibility as the basis of the contract." See, also, Story, Ag. § 248; Wharton, Ag. § 81.

<sup>19</sup> Bolton Partners v. Lambert (1889) 41 Ch. D. 295. This case has been adversely criticised. See Wright, Prin. & Ag. (2d Ed.) 81; Bowstead, Ag. 41;

time of the unauthorized contract and its ratification the other party is contingently bound, although the principal is not bound; but the other party has the responsibility of the agent,<sup>20</sup> whose representation of authority he chose to rely upon, and he may require the principal to ratify or repudiate within a reasonable time.<sup>21</sup> If it would be inconsistent with the intention of the parties to hold his rights in suspense beyond a certain time fixed by the terms of the contract, then there can be no ratification after such time.<sup>22</sup>

There are some cases, however, that take a third ground, namely, that, while a renewal of assent on the part of the other party is not necessary, nevertheless there can be no valid ratification after he has withdrawn, thus likening the original expression of assent to an offer, which can be revoked at any time before it is accepted.<sup>23</sup> The obvious criticism of this theory is that the original expression of assent was not intended to be an offer but a contract.

Campbell, *Sale of Goods & Com. Ag.* 238; Foy, *Spec. Perf.* (3d Ed.) 711; Huffcut, *Ag.* § 38; 5 *Law Q. Rev.* 440; 9 *Harv. Law Rev.* 60.

But it was followed in *Re Portuguese Consolidated Copper Mines*, 45 Ch. D. 16, and in *Re Tiedemann & Ledermann Frere*, [1899] 2 Q. B. 66. Approved in *Clews v. Jamieson*, 182 U. S. 461, at page 483, 21 *Sup. Ct.* 845, 45 L. Ed. 1183. See, also, *Andrews v. Aetna Life Ins. Co. of Hartford*, 92 N. Y. 596, 604. But see *Catholic Foreign Mission Society of America v. Oussani*, 215 N. Y. 1, 109 N. E. 80, *Ann. Cas.* 1917A, 479.

<sup>20</sup> On his warranty of authority, post, p. 98.

<sup>21</sup> *Catholic Foreign Mission Society of America v. Oussani*, 215 N. Y. 1, 109 N. E. 80, *Ann. Cas.* 1917A, 479.

<sup>22</sup> Acceptance by an agent, acting without authority, of an option of purchase, which has to be exercised within a limited time, is not made effective by ratification after the time has expired. *Dibbins v. Dibbins*, [1896] 2 Ch. 348. It would extend the option.

Where a life insurance policy expressly provided that it should not take effect until the advance premium should have been paid during the lifetime of the insured, it was held that an unauthorized payment of the premium during his life could not be ratified by his administrator. *Whiting v. Massachusetts Mut. Life Ins. Co.*, 129 Mass. 240, 37 *Am. Rep.* 317.

A contract to transfer property on a specified date cannot be ratified after that date. *Slocum v. Gilman*, 84 Hun, 405, 32 N. Y. *Supp.* 297.

<sup>23</sup> The aggregatio mentium of the parties need not commence simultaneously. It must coexist, but there must be a period when the question of contract or no contract rests on the will of one party to accept or reject a proposition made, and this interval may be long or short. The offer, of course, may be revoked or withdrawn at any time prior to acceptance, but after acceptance it is too late." *McClintock v. South Penn. Oil Co.*, 146 Pa. 144, 23 *Atl.* 211, 28 *Am. St. Rep.* 785. To the same effect, *Baldwin v. Schiappacasse*, 109 Mich. 170, 66 N. W. 1091.

For an able discussion of this vexed question, see "A Problem as to Ratification," by Prof. Wambaugh, 9 *Harv. Law Rev.* 60.

There is much dicta, but few decisions. See *Mechem, Ag.* (2d Ed.) § 508 et seq.

*Same—Transaction Must Still Stand*

It has been held that, if a contract made by an agent without authority is canceled by the mutual agreement of the agent and the other party, there remains nothing that can be ratified; as where a mere volunteer negotiates insurance and then surrenders the policy before the ostensible principal learns of it and ratifies it.<sup>24</sup>

*Same—Between Principal and Agent*

By the doctrine of relation, ratification invests both principal and agent, as a rule, with the same rights and duties as if the transaction had been previously authorized. If the principal elects to ratify, he assumes the burdens that are incidental to adoption of the agent's act. Hence the agent may look to the principal for compensation<sup>25</sup> and indemnity.<sup>26</sup> And by the ratification the principal ordinarily absolves the agent from all responsibility on account of the unauthorized transac-

<sup>24</sup> *Stillwell v. Staples*, 19 N. Y. 401. See, also, *Cockerham v. Perot*, 48 La. Ann. 209, 19 South. 122. *Mason v. Caldwell*, 10 Ill. (5 Gilman) 196, 48 Am. Dec. 330.

This view finds support in England in the case of *Walter v. James*, L. R. 6 Ex. 124 (1891). In that case an agent, after revocation of his authority, paid money on behalf of his principal to a creditor, who afterwards returned it to the agent at his request. In an action by the creditor against the principal to recover his debt the defendant pleaded payment, but it was held that it was competent for the assumed agent and the third party to cancel the transaction, and that consequently the ratification by plea of payment was too late.

<sup>25</sup> *Wilson v. Dame*, 58 N. H. 392; *Goss v. Stevens*, 32 Minn. 472, 21 N. W. 549; *United States Mortgage Co. v. Henderson*, 111 Ind. 24, 12 N. E. 88.

Where the managing owner of a ship sold her through his agent, and his co-owners ratified the sale they were jointly liable to the agent for his commission. *Keay v. Fenwick*, 1 C. P. D. 745.

Where a real estate agent departs from his authority in effecting a sale, upon ratification the compensation fixed in the original contract of employment controls. *Gelatt v. Ridge*, 117 Mo. 553, 23 S. W. 882, 38 Am. St. Rep. 683.

But a mere volunteer who brings the parties together is not entitled to compensation, even upon a subsequent promise to pay. No consideration. *Sharp v. Hoopes*, 74 N. J. Law, 191, 64 Atl. 989.

<sup>26</sup> *Cornwall v. Wilson*, 1 Ves. 510.

Where an agent defended an action brought against him for breach of a contract entered into by him on behalf of his principal, who ratified what had been done, it was held that he must indemnify the agent against the damages and costs recovered against him in the action. *Frixione v. Tagliaferro*, 10 Moore, P. C. 175; *Blackwell v. Kercheval*, 27 Idaho, 537, 149 Pac. 1060.

Where one person pays another's debt without authority, a subsequent promise to reimburse is a ratification and can be enforced. *Gleason v. Dyke*, 22 Pick. (Mass.) 390. Contra: *Thomson v. Thomson*, 76 App. Div. 178, 78 N. Y. Supp. 389.

tion, whether he was an agent who exceeded or departed from his instructions or a mere volunteer.<sup>27</sup> The ratification must, of course, be made with knowledge of the material facts; for otherwise it will not be binding,<sup>28</sup> whether the want of knowledge arose from concealment or misrepresentation of the agent or from his mere innocent inadvertence.<sup>29</sup> It has been held, however, that an adoption of an agent's unauthorized act in order to make the loss as small as possible is not such a ratification as will relieve the agent;<sup>30</sup> in other words, that in such a case the law will not apply the doctrine of relation for the benefit of an agent who has placed the principal in a position where he is forced to ratify to reduce his loss. And where an agent for collection, who was instructed to remit by express, purchased a check drawn on parties in good standing in New York, and forwarded it to his principal, who sent it to New York for collection, but before it was presented the drawers became insolvent, and the check was dishonored, it was held that sending the check for collection was not such a ratification as to absolve the agent for violating his instructions.<sup>31</sup> And if the principal delays action after knowledge of the facts at the request of the agent, so that his conduct is an implied ratification, the agent is not necessarily absolved from liability for his breach of duty.<sup>32</sup> Ratification as to the other party is not necessarily ratification as to the agent.<sup>33</sup>

<sup>27</sup> *Smith v. Cologan*, 2 T. R. 188, note; *Ætna Ins. Co. v. Sabine*, 6 McLean (U. S.) 393, Fed. Cas. No. 97; *Pickett v. Pearsons*, 17 Vt. 470; *Hazard v. Spears*, \*43 N. Y. 485; *Hanks v. Drake*, 49 Barb. (N. Y.) 186; *Green v. Clark*, 5 Denio (N. Y.) 497, 502; *Bray v. Gunn*, 53 Ga. 144; *Ward v. Warfield*, 3 La. Ann. 468; *Clay v. Spratt*, 7 Bush (Ky.) 334; *Woodward v. Suydam*, 11 Ohio, 360; *Menkens v. Watson*, 27 Mo. 163; *Lunn v. Guthrie*, 115 Iowa, 501, 88 N. W. 1060; *Wann v. Scullin*, 235 Mo. 629, 139 S. W. 425.

<sup>28</sup> *Ante*, p. 16. See, also, cases cited in last note.

<sup>29</sup> *Bank of Owensboro v. Western Bank*, 13 Bush (Ky.) 526, 26 Am. Rep. 211; *Vincent v. Rather*, 31 Tex. 77, 98 Am. Dec. 516; *Story*, Ag. § 243.

<sup>30</sup> *Triggs v. Jones*, 46 Minn. 277, 284, 48 N. W. 1113. See, also, *Walker v. Walker*, 5 Heisk. (Tenn.) 425; *Wharton*, Ag. § 67; *Mechem*, Ag. (2d Ed.) § 440; *Brown v. Foster*, 137 Mich. 35, 100 N. W. 167; *Pacific Vinegar & Pickle Works v. Smith*, 152 Cal. 507, 93 Pac. 85.

<sup>31</sup> *Walker v. Walker*, 5 Heisk. (Tenn.) 425. See *Rathbun v. Citizens' Steamboat Co. of Troy*, 76 N. Y. 376, 32 Am. Rep. 321, distinguishing *Walker v. Walker*.

<sup>32</sup> In *Triggs v. Jones*, 46 Minn. 277, 48 N. W. 1113, plaintiff intrusted to an agent a deed with instructions to deliver it to C. upon formation of a contemplated corporation and delivery to plaintiff of stock therein. The agent delivered the deed without fulfillment of the conditions, and C. conveyed to an innocent purchaser. The agent informed plaintiff of the delivery, and plaintiff did not at once repudiate, but joined in taking steps to form the corporation, which was finally abandoned. In an action to obtain a recon-

<sup>33</sup> See, also, *Rathbun v. Citizens' Steamboat Co. of Troy*, in note 31; *Mechem*, Ag. (2d Ed.) p. 360.

It must be pointed out that there is no apparent reason for applying the doctrine of ratification to the relations between the principal and the agent any more than to the relations between the parties to any other contract of service, such as master and servant, employer and contractor, except the natural inclination to generalize. To thus apply it in all cases would often cause injustice and violate settled principles of law. There must therefore be many exceptions to the rule that ratification governs the relations between principal and agent. Nearly all of the decisions can be explained upon other theories, as, for example, waiver, new consideration, estoppel.

*Same—Between Agent and Third Party*

One who contracts as agent of another is deemed to warrant his authority. If the contract be authorized, the principal, and not the agent, is liable; but, if it turns out that the agent acted without authority, he must respond to the other party in damages.<sup>84</sup> Ratification, being equivalent to previous authority, relieves the agent from all liability to the other party upon an unauthorized contract.<sup>85</sup> If the unauthorized act is a tort, ratification is of course powerless to relieve the assumed agent from responsibility,<sup>86</sup> because he would have been equally liable, though previously authorized,<sup>87</sup> unless the act was one which the principal might lawfully have done, in which case the ratification operates as a justification.<sup>88</sup>

## CAPACITY OF PARTIES—PRINCIPAL

### 8. Capacity to enter into a contract of agency or to act by means of an agent is coextensive with the capacity of the principal to contract.

There are certain persons whom the law declares incapable, wholly or in part, of entering into contracts, and their incapacity of course

veyance and to recover damages against the agent, it was held that because of the delay in repudiating plaintiff was not entitled to a reconveyance, but that his conduct did not amount to such a ratification as to absolve the agent from liability for breach of instructions. See, also, *Robinson Machine Works v. Vorse*, 52 Iowa, 207, 2 N. W. 1108.

<sup>84</sup> Post, p. 98.

<sup>85</sup> *Spittle v. Lavender*, 2 Brod. & B. 452; *Sheffield v. La Due*, 16 Minn. 388 (Gil. 346), 10 Am. Rep. 145; *Berger's Appeal*, 96 Pa. 443.

<sup>86</sup> *Hillberry v. Hatton*, 2 H. & C. 822; *Richardson v. Kimball*, 28 Me. 463; *Perminter v. Kelly*, 18 Ala. 716, 54 Am. Dec. 177.

<sup>87</sup> *Stephens v. Elwall*, 4 M. & S. 259; *Thorp v. Burling*, 11 Johns. (N. Y.) 285.

<sup>88</sup> *Whitehead v. Taylor*, 10 A. & E. 210; *Hull v. Pigerskill*, 1 Brod. & B. 282.

debars them equally from entering into contracts of agency or contracting by means of agents. As a rule, capacity to enter into a contract of agency, or to act or contract by an agent, is coextensive with capacity to contract. In the case of infants and persons non compos mentis, however, there are exceptions.

### *Infants*

It is a general rule of common law, as established by modern decisions, that the contracts of an infant are not void, but are voidable, at his option, either before or after he has attained his majority.<sup>39</sup> We should naturally expect this rule to prevail in respect to the contracts entered into by an infant through an agent. Nevertheless it is generally laid down broadly by the cases that an infant cannot appoint an agent or attorney, and that any such appointment, and consequently all acts and contracts of the agent under such appointment, are absolutely void.<sup>40</sup> It is noticeable that nearly all the cases cited in support of the exception to the general rule which declares the contracts of an infant to be voidable are cases involving the effect of powers of attorney or warrants of attorney to confess judgment,<sup>41</sup> and, while as to these the doctrine is perhaps too firmly established by precedent to be departed from, the tendency of the later decisions is to confine the exception, which has frequently been pronounced to be without reason, to such cases.<sup>42</sup> Indeed, it has been held in a recent case in Minnesota that the

<sup>39</sup> Anson, Contr. 105 et seq.; Pollock, Contr. 50 et seq.; Clark, Contr. 221 et seq.

<sup>40</sup> *Saunderson v. Man*, 1 H. Bl. 75; *Doe v. Roberts*, 16 M. & W. 778; *Fonda v. Van Horne*, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77; *Boal v. Mix*, 17 Wend. (N. Y.) 120, 31 Am. Dec. 285; *Bennett v. Davis*, 6 Cow. (N. Y.) 393; *Knox v. Flack*, 22 Pa. 337; *Waples v. Hastings*, 3 Har. (Del.) 403; *Wainwright v. Wilkinson*, 62 Md. 146; *Philpot v. Bingham*, 55 Ala. 439; *Pyle v. Cravens*, 4 Litt. (Ky.) 17; *Lawrence's Lessee v. McArter*, 10 Ohio, 37; *Armitage v. Widoe*, 36 Mich. 124; *Trueblood v. Trueblood*, 8 Ind. 195, 65 Am. Dec. 756; *Holden v. Curry*, 85 Wis. 504, 55 N. W. 965; *Wambole v. Foote*, 2 Dak. 1, 2 N. W. 239. See, also, *Bartholomew v. Dighton*, Cro. Eliz. 424; *Whittingham's Case*, 8 Co. 42b; *Dexter v. Hall*, 15 Wall. (U. S.) 9, 25, 21 L. Ed. 73; *Tucker v. Moreland*, 10 Pet. (U. S.) 58, 68, 9 L. Ed. 345; *Flexner v. Dickerson*, 72 Ala. 318; *Cole v. Pennoyer*, 14 Ill. 158; *Fetrow v. Wiseman*, 40 Ind. 148, 155.

<sup>41</sup> *Coursolle v. Weyerhauser*, 69 Minn. 328, 333, 72 N. W. 697; *Huffcut*, Ag. § 15.

<sup>42</sup> *Whitney v. Dutch*, 14 Mass. 457, 7 Am. Dec. 229; *Welch v. Welch*, 103 Mass. 562; *Moley v. Brine*, 120 Mass. 324; *Fairbanks v. Snow*, 145 Mass. 153, 13 N. E. 596, 1 Am. St. Rep. 446, per Holmes, J.; *Hardy v. Waters*, 38 Me. 450; *Towle v. Dresser*, 73 Me. 252; *Patterson v. Lippincott*, 47 N. J. Law, 457, 1 Atl. 506, 54 Am. Rep. 178; *Hastings v. Dollarhide*, 24 Cal. 195; *Coursolle v. Weyerhauser*, 69 Minn. 328, 72 N. W. 697.

Cf. *Ewell's Evans*, Ag. 10, note 1; *Ewell's Lead. Cas. on Disabilities*, 44; 13 Am. Law Rev. 287, 288; *Bishop*, Contr. § 930; *Mechem*, Ag. § 55.

The following considerations have been suggested as the foundation of

appointment of an attorney to sell and convey real estate, and a conveyance by the attorney under such appointment, are not void, but are merely voidable, and capable of ratification by the infant on reaching majority.<sup>43</sup>

Upon principle, we should naturally expect the general rule that the contract of a person *non compos mentis* is voidable, and not void,<sup>44</sup> to apply to the contract of agency, and also to a contract entered into by an agent on behalf of an insane principal; nevertheless it has generally been declared that an insane person cannot appoint an agent,<sup>45</sup> and it has been held by the Supreme Court of the United States that a power of attorney executed by a lunatic is absolutely void.<sup>46</sup> It is to be observed, however, that the rule which declares the contracts of insane persons voidable and not void is of comparatively recent origin, and

the exception: "This rule depends upon reasoning, which, if somewhat refined, is yet perhaps well founded. The constituting of an attorney by one whose acts are in their nature voidable is repugnant and impossible, for it is imparting a right which the principal does not possess—that of doing valid acts. If the acts when done by the attorney remain voidable at the option of the infant, the power of attorney is not operative according to its terms; if they are binding upon the infant, then he has done through the agency of another what he could not have done directly—binding acts. The fundamental principle of law in regard to infants requires that the infant should have the power of affirming such acts done by the attorney as he chooses, and avoiding others, at his option; but this involves an immediate contradiction, for to possess the right of availing himself of any of the acts he must ratify the power of attorney, and if he ratifies the power all that was done under it must be confirmed. If he affirms part of the transaction, he at once confirms the power, and thereby, against his intention, affirms the whole transaction. Such personal and discretionary legal capacity as an infant is vested with is, therefore, in its nature, incapable of delegation; and the rule that an infant cannot make an attorney is, perhaps not an arbitrary or accidental exception to a principle, but a direct, necessary, logical necessity of that principle." 1 Am. Lead. Cas. (5th Ed.) 247. It would seem, however, that an infant might ratify a distinct act done under the power without ratifying the power, and without ratifying other acts done under it.

<sup>43</sup> *Coursolle v. Weyerhauser*, 69 Minn. 328, 72 N. W. 697. In this case the power of attorney was not required to be under seal, the deed being operative as a contract to sell.

<sup>44</sup> *Clark, Contr.* (3d Ed.) 223. Void after adjudication, *Gillet v. Shaw*, 117 Md. 508, 83 Atl. 394, 42 L. R. A. (N. S.) 87.

<sup>45</sup> *Stead v. Thompson*, 3 B. & Ad. 357, note (a); *Tarback v. Bispham*, 2 M. & W. 2; *Dexter v. Hall*, 15 Wall. (U. S.) 9, 21 L. Ed. 73; *Snyder v. Sponable*, 1 Hill (N. Y.) 567; *Marvin v. Inglis*, 39 How. Prac. (N. Y.) 329; *Lee v. Morris*, 3 Bush (Ky.) 210; *Story*, Ag. § 6. See, also, *Elias v. Enterprise Building & Loan Ass'n*, 46 S. C. 188, 24 S. E. 102.

<sup>46</sup> *Dexter v. Hall*, 15 Wall. (U. S.) 9, 21 L. Ed. 73. Much of the reasoning in this case goes to prove that the contract of a lunatic is void. See, also, *McClun v. McClun*, 176 Ill. 376, 52 N. E. 928.

its application to agency has as yet received little attention. Doubtless the tendency of the courts is to conform this instance to the general rule and to hold that the right of an insane person to avoid his agent's act is the same as if the act had been performed by himself.<sup>47</sup>

## CAPACITY OF PARTIES—AGENT—CAPACITY TO ACT

### 9. All persons (of sound mind), including persons incapable of contracting on their own behalf, are competent to act as agents.

Inasmuch as the act of an agent is in law the act of his principal, incapacity of the agent to make a binding contract on his own behalf does not debar him from making a binding contract on the part of his principal. "Monks, infants, femmes covert, persons attainted, outlawed, excommunicated, villeins, aliens, etc., may be attorneys."<sup>48</sup> So during the existence of slavery in this country it was held that "a slave, who is homo non civilis, a person who is little above a brute in legal rights, may act as the agent of his owner or hirer."<sup>49</sup>

#### *Persons of Unsound Mind*

It is laid down by Story "that an idiot, lunatic, or person otherwise non compos mentis cannot do any act, as an agent or attorney, binding upon the principal; for they have not any legal discretion or understanding to bestow upon the affairs of others, any more than upon their own."<sup>50</sup> Yet many simple acts of agency can be as well performed by an insane person as by one of sound mind, and it cannot be doubted that such acts of an insane agent would be binding upon the principal. And at the present day, when the contracts of the lunatic himself are voidable and not void, and if executed cannot under certain circumstances be avoided, it is improbable that it would be held without exception that a person non compos mentis cannot, as agent, do any act binding upon his principal. The effect of the agent's insanity upon

<sup>47</sup> *Merritt v. Merritt*, 43 App. Div. 68, 59 N. Y. Supp. 357. See, also, *Drew v. Nunn*, L. R. 4 Q. B. D. 661; *Davis v. Lane*, 10 N. H. 156; *Matthiessen & Weichers Refining Co. v. McMahon's Adm'r*, 38 N. J. Law, 536; *Hill v. Day*, 34 N. J. Eq. 150; *Bunce v. Gallagher*, 5 Blatchf. (U. S.) 481, 489, Fed. Cas. No. 2,133.

<sup>48</sup> Co. Litt. 52a. See, also, *Perkins*, Prof. Bk. §§ 184-187. In some states it is enacted that any person may be an agent. Cal. Civ. Code, § 2296.

<sup>49</sup> *Lyon v. Kent*, 45 Ala. 656. See, also, *Powell v. State*, 27 Ala. 51; *Stanley v. Nelson*, 28 Ala. 514; *Chastain v. Bowman*, 1 Hill (S. C.) 270.

<sup>50</sup> Story, Ag. § 7. See, also, *Mechem*, Ag. § 58; *Ewell's Evans*, Ag. 171.

"Any one, except a lunatic, imbecile, or child of tender years, may be an agent for another." *Lyon v. Kent*, 45 Ala. 656, per Peters, J.

"Any person may be appointed an agent who is of sound mind." Civ. Code Ga. (1895) § 3001.



the rights of the principal and of third persons does not appear to have come before the courts.

*Other Party—Statute of Frauds*

There is no inherent reason why one party to a contract may not act for the other in preparing and signing an instrument which contains its terms,<sup>51</sup> or even as attorney for the other in executing an instrument in its performance. Thus, under a mortgage containing a power of sale, which provides that the mortgagee may purchase at the sale, and that the deed to the purchaser may be made by the mortgagee as attorney of the mortgagor, it has been held that such a deed executed by the mortgagee as attorney directly to himself is valid.<sup>52</sup> However, the statute of frauds provides for a note or memorandum to be "made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized," and this language has been construed to mean that the agent must be some third person, and not the other contracting party; for to hold otherwise would open the door to the fraud which the statute was intended to prevent.<sup>53</sup>

## DELEGATION OF AUTHORITY

10. An agent has no power to delegate his authority to a subagent, or to appoint a deputy or a substitute, to do any act on behalf of his principal, unless authority so to do has been expressly or impliedly conferred.

The appointment of an agent is usually made because of his supposed fitness, as by reason of his possession of judgment, skill, integrity, or other personal qualifications. Inasmuch as confidence in the particular

<sup>51</sup> A memorandum of an agreement, not required by the statute of frauds, made by one party in a book of the other, in his presence and at his request, is evidence against him. *Snyder v. Wolford*, 33 Minn. 175, 22 N. W. 254, 53 Am. Rep. 22.

<sup>52</sup> *Hall v. Bliss*, 118 Mass. 554, 19 Am. Rep. 476; *Woonsocket Inst. for Savings v. American Worsted Co.*, 13 R. I. 255; *Jones, Mortg.* § 1892. But see remarks of Walton, J., in *Clough v. Clough*, 73 Me. 487, 40 Am. Rep. 386.

<sup>53</sup> *Sharman v. Brandt*, L. R. 6 Q. B. 720; *Wright v. Dannah*, 2 Camp. 203; *Fairbrother v. Simmons*, 5 B. & Ald. 333 (memorandum signed by auctioneer, suing as seller); *Smith v. Arnold*, 5 Mason (U. S.) 414, Fed. Cas. No. 13,004; *Bent v. Cobb*, 9 Gray (Mass.) 397, 69 Am. Dec. 295; *Johnson v. Buck*, 35 N. J. Law, 338, 342, 10 Am. Rep. 243; *Tull v. David*, 45 Mo. 444, 100 Am. Dec. 385; *Wilson v. Lewiston Mill Co.*, 150 N. Y. 314, 44 N. E. 959, 55 Am. St. Rep. 680.

The rule does not, however, exclude the agent of the seller from acting as agent of the buyer. *Durrell v. Evans*, 30 L. J. Ex. 354, 6 H. & N. 660. See *Benjamin, Sales*, §§ 267, 267a; *Tiffany, Sales*, 77.

person employed is the basis of the appointment, authority to delegate the performance of the subject-matter of the agency will not, in the absence of peculiar circumstances, be implied.<sup>54</sup> Delegata potestas non potest delegari—delegated authority cannot be delegated. Thus, where goods are consigned to a factor, the factor has ordinarily no authority to deliver over the goods to a third person for sale, and such a disposition of the goods would be a conversion.<sup>55</sup> So, a person authorized to sell land must exercise his own judgment and discretion, and cannot delegate the performance of his agency to another.<sup>56</sup> So, a person authorized to accept bills of exchange or make promissory notes must exercise his judgment as to the necessity or propriety of accepting a bill or executing a note, and, in the absence of circumstances peculiar to the particular agency, authority to delegate the performance of these duties will not be implied.<sup>57</sup>

#### *Authority Implied as to Ministerial Acts*

On the other hand, if an act is purely ministerial, and consequently does not involve the exercise of judgment or discretion, it is to be assumed that the principal is willing to have it performed by any person whom the agent may appoint. The principal may, of course, so limit the authority that every such act must be performed by the very hand of the agent. But, in the absence of such express limitation, authority to

<sup>54</sup> Catlin v. Bell, 4 Camp. 183; Henderson v. Barnwell, 1 Y. & J. 387; Emerson v. Providence Hat Mfg. Co., 12 Mass. 237, 7 Am. Dec. 66; President, etc., of Appleton Bank v. McGilvray, 4 Gray (Mass.) 518, 64 Am. Dec. 92; Wright v. Boynton, 37 N. H. 9, 72 Am. Dec. 319; Lewis v. Ingersoll, 3 Abb. Dec. (N. Y.) 55; Sayre v. Nichols, 7 Cal. 535, 68 Am. Dec. 280; Lynn v. Burgoyne, 13 B. Mon. (Ky.) 400; Ruthven v. American Fire Ins. Co., 92 Iowa, 316, 60 N. W. 663; Waldman v. North British & Mercantile Ins. Co., 91 Ala. 170, 8 South. 666, 24 Am. St. Rep. 883; Fargo v. Cravens, 9 S. D. 646, 70 N. W. 1053.

<sup>55</sup> Cockran v. Irlam, 2 M. & S. 301; Warner v. Martin, 11 How. 223, 13 L. Ed. 667; Campbell v. Reeves, 3 Head (Tenn.) 226. See Southern v. How, Cro. Jac. 468.

So as to a trusted messenger. Murray v. Postal Telegraph-Cable Co., 210 Mass. 188, 96 N. E. 316, Ann. Cas. 1912C, 1183.

<sup>56</sup> Tynan v. Dullnig (Tex. Civ. App.) 25 S. W. 465, Id., 818; Carroll v. Tucker, 2 Misc. Rep. 397, 21 N. Y. Supp. 952.

<sup>57</sup> Emerson v. Providence Hat Mfg. Co., 12 Mass. 237, 7 Am. Dec. 66; Commercial Bank of Lake Erie v. Norton, 1 Hill (N. Y.) 501.

So as to accepting risks for a surety company. Cullinan v. Bowker, 180 N. Y. 93, 72 N. E. 911.

Where the agency is general, to take charge of and manage the business of the principal, power to delegate may be implied. McConnell v. Mackin, 22 App. Div. 537, 48 N. Y. Supp. 18.

But not to delegate the entire business of the agency. Peterson v. Christensen, 26 Minn. 377, 4 N. W. 623.

delegate the performance of ministerial acts is implied.<sup>58</sup> Thus, an agent having authority to make contracts, accept bills of exchange, or execute promissory notes, may, after exercising his judgment as to the terms of a contract or the propriety of accepting a bill or executing a note, delegate to another the mechanical duty of reducing the contract to writing or signing the paper.<sup>59</sup> So, an agent authorized to sell land, who has examined the land and fixed the price, may avail himself of the services of another to find a purchaser and conclude a sale upon the terms fixed.<sup>60</sup>

### *Authority Implied from Circumstances*

Although power to delegate, except as to ministerial acts, will not be implied as a mere incident to the authority of an agent, it may be implied from the circumstances of the particular agency.<sup>61</sup>

Thus, power of delegation may be implied from the previous course of dealing, or from the knowledge of the principal that an agent is in the habit of conducting his business by means of subagents.<sup>62</sup> It will be implied where, from the nature of the business which is the subject of the agency, it is necessary or reasonable that it should be conducted by means of subagents.<sup>63</sup> For example, where a note is deposited with a bank for collection, authority to employ a notary to

<sup>58</sup> *Lord v. Hall*, 8 C. B. 627; *Mason v. Joseph*, 1 Smith, 406; *Lyon v. Jerome*, 26 Wend. (N. Y.) 485, 37 Am. Dec. 271; *Williams v. Woods*, 16 Md. 220; *Newell v. Smith*, 49 Vt. 255; *Grinnell v. Buchanan*, 1 Daly (N. Y.) 538; *Eldridge v. Holway*, 18 Ill. 445; *Grady v. American Cent. Ins. Co.*, 60 Mo. 116; *Weaver v. Carnall*, 35 Ark. 198, 37 Am. Rep. 22. Cf. *Rossiter v. Trafalgar L. Ass'n*, 27 Beav. 377, 381; *Freudenheim v. Gütter*, 201 N. Y. 94, at page 102, 94 N. E. 640.

<sup>59</sup> *Exp. Sutton*, 2 Cox, 84; *Lord v. Hall*, 2 C. & K. 698; *Commercial Bank of Lake Erie v. Norton*, 1 Hill (N. Y.) 501; *Sayre v. Nichols*, 7 Cal. 535, 68 Am. Dec. 280; *Norwich University v. Denny*, 47 Vt. 13 (subscription agreement); *Grady v. American Cent. Ins. Co.*, 60 Mo. 116 (insurance policy); *Calhoun v. Buhre*, 75 N. J. Law, 439, 67 Atl. 1068; *Cullinan v. Bowker*, 180 N. Y. 93, 72 N. E. 911.

<sup>60</sup> *Renwick v. Bancroft*, 56 Iowa, 527, 9 N. W. 367.

An agent to sell land may employ another to point out the land to a purchaser. *McKinnon v. Vollmar*, 75 Wis. 82, 43 N. W. 800, 6 L. R. A. 121, 17 Am. St. Rep. 178.

<sup>61</sup> *De Bussche v. Alt*, 8 Ch. D. 286, per Thesiger, L. J.

<sup>62</sup> *Quebec & R. R. Co. v. Quinn*, 12 Mo. P. C. 232; *Warner v. Martin*, 11 How. (U. S.) 223, 13 L. Ed. 667; *Johnson v. Cunningham*, 1 Ala. 249; *Loomis v. Simpson*, 13 Iowa, 532.

<sup>63</sup> *De Bussche v. Alt*, 8 Ch. D. 286; *Quebec & R. R. Co. v. Quinn*, 12 Mo. P. C. 223; *Rossiter v. Trafalgar L. A. Ass'n*, 27 Beav. 377; *Johnson v. Cunningham*, 1 Ala. 249; *Planters' & Farmers' Nat. Bank of Baltimore v. First Nat. Bank of Wilmington*, N. C., 75 N. C. 534.

A stockbroker may act through a subagent where the purchase or sale is to be made in a distant city. *Rosenstock v. Tormey*, 32 Md. 169, 3 Am. Rep. 125.

protest it in case of dishonor is necessarily implied,<sup>64</sup> and if the note is payable at a distant place authority to employ the agency of a bank at the place of payment is necessarily implied.<sup>65</sup> So, authority to prosecute a suit implies authority to employ an attorney to conduct it.<sup>66</sup> And, if a principal knows that the business which he intrusts to an agent is so extensive that he cannot transact it without employing subagents, authority to do so is implied.<sup>67</sup>

Power to delegate will be implied where the employment of a subagent is justified by the usage of the business or trade in which the agent is employed,<sup>68</sup> provided the usage is not inconsistent with the express terms of the authority.<sup>69</sup> Thus, where, by usage of trade, a factor is authorized to employ another person to dispose of the property, such authority is implied.<sup>70</sup> In many cases where authority is to be implied from the nature of the business it may also be implied from usage or custom.<sup>71</sup>

<sup>64</sup> *Warren Bank v. Suffolk Bank*, 10 Cush. (Mass.) 582; *Baldwin v. Bank of Louisiana*, 1 La. Ann. 13, 45 Am. Dec. 72.

<sup>65</sup> *President, etc., of Dorchester & Milton Bank v. President, etc., of New England Bank*, 1 Cush. (Mass.) 177. See, also, cases cited, p. 39, notes 75 and 76.

<sup>66</sup> *Inhabitants of Buckland v. Inhabitants of Conway*, 16 Mass. 396.

<sup>67</sup> *Bodine v. Exchange Fire Ins. Co. of City of New York*, 51 N. Y. 117, 10 Am. Rep. 566; *Arff v. Star Fire Ins. Co.*, 125 N. Y. 57, 25 N. E. 1073, 10 L. R. A. 609, 21 Am. St. Rep. 721; *Grady v. American Cent. Ins. Co.*, 60 Mo. 116; *First Nat. Bank of Binghamton v. Commercial Travelers' Home Ass'n of America*, 108 App. Div. 78, 95 N. Y. Supp. 454, *aff'd* 185 N. Y. 575, 78 N. E. 1103.

"We know, according to the ordinary course of business, that insurance agents frequently have clerks to assist them, and that they could not transact their business if obliged to attend to all the details in person; and these clerks can bind their principals in any of the business which they are authorized to transact. An insurance agent can authorize his clerk to contract for risks, to deliver policies, to collect premiums, and to take payment of premiums in cash or securities, and to give credit for premiums, or to demand cash; and the act of the clerk in all such cases is the act of the agent, and binds the company just as effectually as if it were done by the agent in person. The maxim of 'Delegatus non potest delegare' does not apply in such a case." *Bodine v. Exchange Fire Ins. Co. of City of New York*, *supra*, per Earl, J.

<sup>68</sup> *Warner v. Martin*, 11 How. (U. S.) 223, 13 L. Ed. 667; *Johnson v. Cunningham*, 1 Ala. 249; *Darling v. Stanwood*, 14 Allen (Mass.) 504; *Smith v. Sublett*, 28 Tex. 163; *Gray v. Murry*, 3 Johns. Ch. (N. Y.) 167.

<sup>69</sup> *Emerson v. Providence Hat Mfg. Co.*, 12 Mass. 237, 7 Am. Dec. 66.

<sup>70</sup> *Laussatt v. Lippincott*, 6 Serg. & R. (Pa.) 386, 9 Am. Dec. 440.

<sup>71</sup> See *Wilson v. Smith*, 3 How. (U. S.) 763, 11 L. Ed. 820.

## RESPONSIBILITY FOR ACTS OF SUBAGENT—PRIVITY OF CONTRACT

11. Where a subagent is appointed by authority of the principal, the subagent is, so far as relates to third persons, the agent of the principal, and the acts of the subagent are binding upon the principal; but whether, as between principal and subagent, the relation of principal and agent is created, so that the subagent is responsible to the principal, depends upon whether the agent has been authorized to employ the subagent on the principal's behalf—that is, to create privity of contract between them—or has been authorized simply to employ a subagent on his own responsibility.

If an agent without authority employs a subagent, the latter assumes no obligation towards the principal, since there is no privity of contract between them. The subagent is responsible only to the agent, who is his employer, and he in turn is responsible to the principal for the acts of the subagent.<sup>72</sup> It does not follow, however, that because the employment of a subagent is authorized privity of contract is created between him and the principal, so that he is responsible to the principal, or that the agent is discharged from responsibility for the acts of the subagent.

Whenever the employment is authorized, the acts of the subagent are, indeed, binding upon the principal; or, in other words, the subagent is, so far as relates to third persons, the agent of the principal. But whether, as between principal and subagent, the relation of principal and agent is created by the employment depends upon the nature of the authority conferred upon the agent. The principal may confer authority upon any terms and subject to any conditions which he sees

<sup>72</sup> *Stevens v. Babcock*, 3 B. & Ad. 354; *President, etc., of Appleton Bank v. McGilvray*, 4 Gray (Mass.) 518, 64 Am. Dec. 92; *Barnard v. Coffin*, 141 Mass. 37, 6 N. E. 364, 55 Am. Rep. 443.

Defendants were employed by plaintiff to aid him in selling land by obtaining offers and communicating them to plaintiff, together with such information as they could readily obtain, and by consummating a sale in case of acceptance. Defendants employed O., who obtained an offer for \$22.50, but reported to defendants that he had received an offer for \$10 per acre, which defendants bona fide reported to plaintiff, advising him it was a fair price, and a sale was consummated, O. accounting to defendants, and they to plaintiff, on the basis of \$10, though O. obtained \$22.75 per acre. Held that, if O. was employed without plaintiff's express or implied consent, there being no usage or necessity therefor, no privity was created between plaintiff and O., and defendants were liable for the balance of the price received by O. *Barnard v. Coffin*, supra.

fit to impose. He may, on the one hand, authorize the employment of a subagent on his own behalf. In such case by the employment privity of contract is created between principal and subagent, who becomes thereby the agent of and responsible to the principal, and the agent discharges his whole duty if he exercises reasonable care in the selection of the subagent, and is not responsible for his acts or defaults. On the other hand, the principal may authorize the employment of a subagent simply on the agent's behalf; that is, at the agent's risk and upon his responsibility. In such case the principal is, of course, bound by the acts of the subagent, because he has consented to be bound by them; but no privity of contract is created between him and the subagent, because he has not authorized the agent to make a contract of employment to which he (the principal) shall be a party. Privity of contract in such case exists only between the agent and the subagent, and the agent is responsible for the acts and defaults of the subagent, because such was the intention of the principal and the undertaking of the agent.<sup>73</sup>

The same principles apply when the authority of an agent to employ a subagent is derived from ratification.<sup>74</sup>

If the terms of agency were always fully expressed, no difficulty in applying these principles would arise; but because the intention of the parties, and consequently the nature of the authority, is ordinarily matter of inference, difficult questions of fact are presented for determination.

#### *Same—Bank as Agent—Deposit for Collection*

When a bank receives from a customer for collection a bill or note payable at a distant place, the parties necessarily contemplate that the

<sup>73</sup> "If the agency is an undertaking to do the business, the original principal may look to the immediate contractor with himself, and is not obliged to look to inferior or distant undercontractors or subagents." *Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S. 276, 5 Sup. Ct. 141, 28 L. Ed. 722, per Blatchford, J. And see cases cited, note 76, *infra*, for statements of this rule.

<sup>74</sup> "It is argued that, as the plaintiff knew before he signed the deed that the sale was made by Ochs, the plaintiff, by confirming the sale and signing the deed, ratified the employment of Ochs. If the plaintiff understood that Ochs was employed by the defendants as his agent, then these acts of the plaintiff might be held to be a ratification of his employment, and equivalent to an authority to the defendants to employ Ochs as the agent of the plaintiff. But if the plaintiff understood that the defendants employed Ochs as their agent to assist them in transacting the business which they had undertaken, then these acts of the plaintiff might only show that the plaintiff was willing that the defendants should transact the business by means of their servants or agents for whom they should be responsible; and it was competent for the court, on the evidence, to find that this was the understanding and intention of the plaintiff." *Barnard v. Coffin*, 141 Mass. 37, 6 N. E. 364, 55 Am. Rep. 443, per Field, J.

bank shall send the paper to the place where it is payable, and shall employ some subagent there to collect and receive payment. So far as the debtor is concerned, such subagent is the agent of the customer or principal, and payment to the subagent is binding upon the principal. The question remains whether privity of contract is created between principal and subagent, so that the subagent is directly responsible to the principal, and the home bank or agent is responsible only for due care in selection, or whether the subagent is agent of and responsible to the home bank, and it is responsible to the principal for the neglects and defaults of the subagent. If, as is sometimes done, the parties have expressed their intention in this regard, no difficulty arises. In the absence of any express agreement, the answer to the question depends upon the understanding to be implied from the deposit of the paper for collection, and in their interpretation of this transaction the courts have taken opposite views. By a majority of the courts in this country it is held that the home bank merely undertakes to use due care in transmitting the paper and in selecting a subagent.<sup>75</sup> By other courts<sup>76</sup> including the Supreme Court of the United States,<sup>77</sup> it is held that the bank undertakes to collect the paper, and thus assumes the liability of an independent contractor with responsibility for the acts and defaults of its subagents. If, as intimated in

<sup>75</sup> *President, etc., of Dorchester & Milton Bank v. President, etc., of New England Bank*, 1 Cush. (Mass.) 177; *East Haddam Bank v. Scovil*, 12 Conn. 303; *Jackson v. Union Bank of Maryland*, 6 Har. & J. (Md.) 146; *Citizens' Bank of Baltimore v. Howell*, 8 Md. 530, 63 Am. Dec. 714; *Hyde v. Planters' Bank of Mississippi*, 17 La. 560, 36 Am. Dec. 621; *Third Nat. Bank of Louisville v. Vicksburg Bank*, 61 Miss. 112, 48 Am. Rep. 78; *Stacy v. Dane County Bank*, 12 Wis. 629; *Merchants' Nat. Bank v. Goodman*, 109 Pa. 422, 2 Atl. 687, 58 Am. Rep. 728; *Bank of Louisville v. First Nat. Bank of Knoxville*, 8 Baxt. (Tenn.) 101, 35 Am. Rep. 691; *Daly v. Butchers' and Drovers' Bank*, 56 Mo. 94, 17 Am. Rep. 663; *Guelich v. National State Bank*, 56 Iowa, 434, 9 N. W. 328, 41 Am. Rep. 110; *First Nat. Bank of Pawnee City v. Sprague*, 34 Neb. 318, 51 N. W. 846, 15 L. R. A. 498, 33 Am. St. Rep. 644; *Irwin v. Reeves Pulley Co.*, 20 Ind. App. 101, 48 N. E. 601, 50 N. E. 317; *Wilson v. Carlinville Nat. Bank*, 187 Ill. 222, 58 N. E. 250, 52 L. R. A. 632. Numerous other cases are cited in the above.

<sup>76</sup> *Allen v. Merchants' Bank of City of New York*, 22 Wend. (N. Y.) 215, 34 Am. Dec. 289; *Ayrault v. Pacific Bank*, 47 N. Y. 570, 7 Am. Rep. 489; *Titus v. Mechanics' Nat. Bank at Trenton*, 35 N. J. Law, 588; *Reeves v. State Bank of Ohio*, 8 Ohio St. 465; *Simpson v. Waldby*, 63 Mich. 439, 30 N. W. 199; *Streissguth v. National German American Bank*, 43 Minn. 50, 44 N. W. 797, 7 L. R. A. 363, 19 Am. St. Rep. 213; *Power v. First Nat. Bank*, 6 Mont. 251, 12 Pac. 597; *State Nat. Bank of Ft. Worth v. Thomas Mfg. Co.*, 17 Tex. Civ. App. 214, 42 S. W. 1016. Numerous other cases are cited in the above. See, also, *Mackersy v. Remsay*, 9 Cl. & F. 818; *Van Wart v. Wooley*, 3 B. & C. 439. Cf. *Commercial Bank v. Red River Val. Nat. Bank*, 8 N. D. 382, 79 N. W. 859.

<sup>77</sup> *Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S. 276, 5 Sup. Ct. 141, 28 L. Ed. 722.

Exchange National Bank v. Third National Bank, the question is to be determined "according to those principles which will best promote the welfare of the commercial community," it would seem that the rule adopted in that case, which does not compel the customer to resort for a remedy to a distant and unknown agent, is to be preferred.

The same conflict of authority exists in respect to the responsibility of the bank for the acts and defaults of a notary employed by it to protest paper which it has received for collection.<sup>78</sup>

*Same—Attorney for Collection*

A similar question is presented when a claim is placed in the hands of an attorney for collection. If the debtor resides at a distant place, the attorney necessarily has authority to employ an attorney or agent at that place, and whether the latter is agent of the first attorney or of the principal is a question of fact, depending upon the understanding of the original parties.<sup>79</sup> Many cases turn upon the construction of receipts, stating in terms that the claim is received "for collection," and such receipts have generally been construed as importing an undertaking to collect, and not merely to transmit to a suitable agent to collect.<sup>80</sup> The same construction has been placed upon the undertaking of commercial agencies in respect to claims received for collection.<sup>81</sup> The receipt may, of course, contain terms requiring a different construction.<sup>82</sup>

<sup>78</sup> That the bank is responsible only for due care in selecting the notary. Warren Bank v. Suffolk Bank, 10 Cush. (Mass.) 582; Bellemire v. Bank of United States, 4 Whart. (Pa.) 105, 33 Am. Dec. 46; Stacy v. Dane County Bank, 12 Wis. 629; Baldwin v. Bank of Louisiana, 1 La. Ann. 13, 45 Am. Dec. 72; Third Nat. Bank of Louisville v. Vicksburg Bank, 61 Miss. 112, 48 Am. Rep. 78.

To the same effect, but on the ground that the notary is a public officer whose duties are prescribed by statute. Britton v. Niccolls, 104 U. S. 757, 26 L. Ed. 917 (distinguished in Exchange Nat. Bank v. Third Nat. Bank, 112 U. S. 276, 5 Sup. Ct. 141, 28 L. Ed. 722); First Nat. Bank of Gallipolis v. Butler, 41 Ohio St. 519, 52 Am. Rep. 94.

Probably the weight of authority supports this view. Mechem, Ag. (2d Ed.) p. 952.

That the bank is responsible for the acts and defaults of the notary. Ayrault v. Pacific Bank, 47 N. Y. 570, 7 Am. Rep. 489; Davey v. Jones, 42 N. J. Law, 28, 36 Am. Rep. 505; Bank of Lindsborg v. Ober & Hageman, 31 Kan. 599, 3 Pac. 324.

<sup>79</sup> National Bank of Republic v. Old Town Bank of Baltimore, 50 C. C. A. 443, 112 Fed. 726.

<sup>80</sup> Bradstreet v. Everson, 72 Pa. 124, 13 Am. Rep. 665 (citing cases); Cummins v. Heald, 24 Kan. 600, 36 Am. Rep. 264.

<sup>81</sup> Bradstreet v. Everson, 72 Pa. 124, 13 Am. Rep. 665; Weyerhauser v. Dun, 100 N. Y. 150, 2 N. E. 274; Dale v. Hepburn, 11 Misc. Rep. 286, 32 N. Y. Supp. 269.

<sup>82</sup> Sanger v. Dun, 47 Wis. 615, 3 N. W. 388, 32 Am. Rep. 789.



## TERMINATION OF RELATION

### 12. The relation of principal and agent may terminate—

- (a) By express or implied limitation;
- (b) By act of party;
- (c) By operation of law.

The rules relating to the termination of the relation of principal and agent may be discussed conveniently under the above heads. The fundamental rule is that the continuance of the relation, like its formation, depends upon the will of the parties, although circumstances may arise which terminate it by operation of law.

#### *Termination by Limitation*

The time during which the relation of principal and agent shall continue may be fixed by the express<sup>83</sup> or implied<sup>84</sup> terms of the appointment, so that the authority of the agent expires by its own limitation. Thus, the employment may be for a certain period of time or until the happening of an event. Where an agent is employed for a particular transaction, the relation necessarily ceases when the agent has accomplished the purposes of the agency.<sup>85</sup> When the relation has been so terminated, the agent is *functus officio*, and can no longer bind his principal,<sup>86</sup> nor is he any longer precluded from acquiring an adverse interest.<sup>87</sup>

When an agent is employed to perform an act, it is usually an implied term of the appointment, unless a contrary intention is manifested, that the authority shall cease in the event of the principal himself performing the act or causing it to be otherwise performed.<sup>88</sup> In

<sup>83</sup> *Danby v. Coutts*, 29 Ch. D. 500 (during principal's absence from England); *Gundlach v. Fischer*, 59 Ill. 172.

<sup>84</sup> *Dickinson v. Litwall*, 4 Camp. 279 (usage that broker's authority expires with day on which he is employed).

<sup>85</sup> *Blackburn v. Scholer*, 2 Camp. 341, 343; *Walker v. Derby*, 5 Biss. 134, Fed. Cas. No. 17,068.

An agent employed to let or sell a house after having let had no authority to sell, and was not entitled to commission on sale. *Gillow v. Aberdare*, 9 T. L. R. 12.

The authority of a solicitor retained to conduct an action ceases with the judgment. *Macbeath v. Ellis*, 4 Bing. 468; *Butler v. Knight*, L. R. 2 Ex. 66.

An auctioneer's authority ceases with sale. *Seton v. Slade*, 7 Ves. 265, 276.

After completion of the transaction, a declaration of the agent is not binding on the principal. *Atlanta Sav. Bank v. Spencer*, 107 Ga. 629, 33 S. E. 878.

<sup>86</sup> After contract of sale is completed, broker cannot alter terms. *Blackburn v. Scholer*, 2 Camp. 341, 343.

<sup>87</sup> *Moore v. Stone*, 40 Iowa, 259; *Short v. Millard*, 68 Ill. 292.

<sup>88</sup> *Ahern v. Baker*, 34 Minn. 98, 24 N. W. 341; *Gilbert v. Holmes*, 64 Ill.

such case the authority is determined by implied limitation, and notice of revocation is not necessary. Thus, where an agent authorized to sell a piece of land effected a sale to A., but in the meantime, without notice to him, the principal had sold the land through another agent, and executed a conveyance to another purchaser, it was held that A. could not maintain an action against the principal for damages for breach of contract.<sup>89</sup> So the authority of the agent terminates upon the extinction of the subject-matter of the agency, as if the principal authorizes the agent to sell a ship, which is afterwards lost, since it is an implied term or condition of the appointment that the thing with reference to which the authority is to be exercised shall continue to exist.<sup>90</sup>

### *Termination by Act of Party—Revocation*

Since the power of one person to act for another depends upon the will of that other, the power to act, if it has been conferred, ceases when the other has manifested his will that it shall cease. It is a rule, therefore, that the principal may revoke the authority of an agent at any time before it is executed, and that when revoked the authority ceases.<sup>91</sup> No subsequent act of the agent is binding upon the principal.<sup>92</sup>

548; *Bissell v. Terry*, 69 Ill. 184; *Walker v. Denison*, 86 Ill. 142; *Kelly v. Brennan*, 55 N. J. Eq. 423, 37 Atl. 137.

The Illinois cases say that there is a revocation by operation of law, the power of the principal over the subject-matter having ceased; but if the agent were entitled to notice, as in case of an exclusive agency to sell, it seems that he might make a binding contract of sale, entitling the purchaser to damages, although the principal had conveyed. "The plaintiff (defendant) had a right to employ several agents, and the act of one in making a sale would preclude the others without any notice, unless the nature of his contract with them required it." *Ahern v. Baker*, *supra*. Cf. *Jones v. Hodgkins*, 61 Me. 480.

Also called implied revocation by principal and applied to disposing of subject-matter. *Mechem*, Ag. (2d Ed.) § 619.

Where the treasurer of a town was authorized to borrow to adjust a tax, which was adjusted before he acted, his authority ceased. *Benoit v. Inhabitants of Conway*, 10 Allen (Mass.) 528.

<sup>89</sup> *Ahern v. Baker*, 34 Minn. 98, 24 N. W. 341; *Kelly v. Brennan*, 55 N. J. Eq. 423, 37 Atl. 137; *White v. Benton*, 121 Iowa, 354, 96 N. W. 876.

But in *Woodall v. Foster*, 91 Tenn. 195, 18 S. W. 241, it was held that agent could recover compensation. See *Mechem*, Ag. (2d Ed.) § 625.

<sup>90</sup> *Story*, Ag. § 499.

<sup>91</sup> *Hunt v. Rousmanier*, 8 Wheat. (U. S.) 174, 5 L. Ed. 589; *Rees v. Pellow*, 38 C. C. A. 94, 97 Fed. 167; *Blackstone v. Buttermore*, 53 Pa. 266; *Chambers v. Seay*, 73 Ala. 373; *Smith v. Dare*, 89 Md. 47, 42 Atl. 909; *Taylor v. Burns*, 203 U. S. 120, 27 Sup. Ct. 40, 51 L. Ed. 116; *Hartshorne v. Thomas*, 43 N. J. E. 419, 10 Atl. 843; *Smith v. Kimball*, 193 Mass. 582, 79 N. E. 800; *Gardner v. Pierce*, 131 App. Div. 605, 116 N. Y. Supp. 155.

<sup>92</sup> *Taylor v. Lendley*, 9 East, 49; *Warwick v. Slade*, 11 Camp. 127.

Thus, the authority of an auctioneer may be revoked at any time before the goods are knocked down to a purchaser.<sup>93</sup> And, if a broker is authorized to buy or sell, the authority may be revoked at any time before completion of a contract of purchase or of sale.<sup>94</sup> The principal can revoke the authority although he has agreed to employ the agent for a longer time, and by revoking is guilty of a breach of the contract of employment for the power is distinct from the right to revoke.<sup>95</sup> The general rule is subject to important exceptions in certain cases where the interest of the agent or of some other person is involved in the continuance of the authority, a subject which will be considered later.<sup>96</sup>

### *Same—Renunciation of Appointment*

Since the relation depends upon the will of both parties, it may be determined at any time by the renunciation of the agent,<sup>97</sup> subject, as in the case of revocation, to the right of the other party to recover damages for breach of the contract of employment, if such contract exists.<sup>98</sup> The intention to renounce must, of course, be communicated to the principal, but it may be implied from the conduct of the agent, as when he abandons the business of the agency, and the principal may then treat the agency as terminated.<sup>99</sup>

### *Same—Termination by Agreement*

Since the relation of principal and agent may be terminated by either party, it may, of course, be terminated by agreement.<sup>1</sup>

<sup>93</sup> *Manser v. Back*, 6 Hare, 443.

<sup>94</sup> *Farmer v. Robinson*, 2 Camp. 339, note.

<sup>95</sup> *Coffin v. Landis*, 46 Pa. 426; *Lewis v. Atlas Mut. Life Ins. Co.*, 61 Mo. 534; *Standard Oil Co. v. Gilbert*, 84 Ga. 714, 11 S. E. 491, 8 L. R. A. 410; *Green v. Cole*, 127 Mo. 587, 30 S. W. 135; *Walker v. Hancock Mut. Life Ins. Co.*, 80 N. J. Law, 342, 79 Atl. 354, 35 L. R. A. (N. S.) 153, Ann. Cas. 1912A, 526.

"The authority is distinct from the contract of employment." *Mechem*, Ag. (2d Ed.) § 568.

<sup>96</sup> *Post*, p. 48.

<sup>97</sup> *United States v. Jarvis*, 2 Ware, 278, Fed. Cas. No. 15,468; *Barrows v. Cushway*, 37 Mich. 481. See, also, *First Nat. Bank v. Bissell* (C. C.) 2 McCrary, 73, 4 Fed. 694. On breach of a contract of agency by the principal, the agent is justified in repudiating the agency. *Duffield v. Michaels* (C. C.) 97 Fed. 825.

<sup>98</sup> *United States v. Jarvis*, 2 Ware, 278, Fed. Cas. No. 15,468; *White v. Smith*, 6 Lans. (N. Y.) 5, affirmed 54 N. Y. 522; *Cannon Coal Co. v. Taggart*, 1 Colo. App. 60, 27 Pac. 238.

<sup>99</sup> *Stoddard v. Key*, 62 How. Prac. (N. Y.) 137; *Case v. Jennings*, 17 Tex. 661. Cf. *Leopold v. Salkey*, 89 Ill. 412, 31 Am. Rep. 93; *Munson v. Mabon*, 135 Iowa, 335, 112 N. W. 775; *Jackson v. Parrish*, 157 Ala. 584, 47 South. 1014.

<sup>1</sup> *Binsse v. Ohl*, 51 N. J. Law, 47, 16 Atl. 305.

### *Termination by Operation of Law*

Circumstances may occur, after the creation of an agency, which terminate it irrespective of its original limitation or of the act of the parties directed to that end. An agency is terminated by the death, insanity, or bankruptcy of one or the other of the parties, by war, or by a change of law rendering the continuance of the agency unlawful. In these cases the agency may be said to be dissolved, for lack of better term, "by operation of law."<sup>2</sup> Some of these forms of termination—for example, termination by death or bankruptcy of the agent—might perhaps be classed logically under the head of termination by original limitation, but the above classification has been adopted for the sake of convenience.

### *Same—Death*

The authority of the agent, unless it be coupled with an interest,<sup>3</sup> is terminated by the death of the principal.<sup>4</sup> This results logically from the representative character of the agent, the authority to act necessarily presupposing a principal to be bound. The authority is also terminated by the death of one of two or more joint principals,<sup>5</sup> or by the death of a partner in case of an agent appointed by a firm.<sup>6</sup> The authority terminates from the moment of death, and all subsequent acts of the agent are nullities, although the death was unknown to him and to the third person dealing with him.<sup>7</sup> Owing to the harshness of this rule, it has not become established without some dissent.<sup>8</sup>

<sup>2</sup> Under dissolution by operation of law, Story includes all forms of dissolution except by revocation or renunciation. Story, Ag. § 462.

<sup>3</sup> Post, p. 48.

<sup>4</sup> *Watson v. King*, 4 Camp. 272; *Wallace v. Cook*, 5 Esp. 46; *Blader v. Free*, 9 B. & C. 167; *Hunt v. Rousmanier*, 8 Wheat. (U. S.) 174, 5 L. Ed. 589; *Pacific Bank v. Hannah*, 32 C. C. A. 522, 90 Fed. 72; *Lincoln v. Emerson*, 108 Mass. 87; *Brown v. Cushman*, 173 Mass. 368, 53 N. E. 860; *Harper v. Little*, 2 Greenl. (Me.) 14, 11 Am. Dec. 25; *Davis v. Windsor Sav. Bank*, 46 Vt. 728; *Clayton v. Merrett*, 52 Miss. 353; *Darr v. Darr*, 59 Iowa, 81, 12 N. W. 765; *Connor v. Parsons* (Tex. Civ. App.) 30 S. W. 83; *Duckworth v. Orr*, 126 N. C. 674, 36 S. E. 150; *Tuttle v. Green*, 5 Ariz. 179, 48 Pac. 1009; *In re Kern's Estate*, 176 Pa. 373, 35 Atl. 231.

<sup>5</sup> *Rowe v. Rand*, 111 Ind. 206, 12 N. E. 377. Cf. *Tasher v. Shephard*, 6 H. & N. 575; *Long v. Thayer*, 150 U. S. 520, 14 Sup. Ct. 189, 37 L. Ed. 1167.

<sup>6</sup> *Griggs v. Swift*, 82 Ga. 392, 9 S. E. 1062, 5 L. R. A. 405, 14 Am. St. Rep. 176. But see *Bank of New York v. Vanderhorst*, 32 N. Y. 553.

<sup>7</sup> *Long v. Thayer*, 150 U. S. 520, 14 Sup. Ct. 189, 37 L. Ed. 1167; *Weber v. Bridgman*, 113 N. Y. 600, 21 N. E. 985; *Farmers' Loan & Trust Co. v. Wilson*, 139 N. Y. 284, 34 N. E. 784, 36 Am. St. Rep. 696; *Soltan v. Good-year Vulcanite Co.*, 12 Misc. Rep. 131, 33 N. Y. Supp. 77; *Jenkins v. Atkins*, 1 Humph. (Tenn.) 294, 34 Am. Dec. 648; *Lewis v. Kerr*, 17 Iowa, 73. And see cases cited note 4, supra.

<sup>8</sup> *Cassiday v. McKenzie*, 4 Watts & S. (Pa.) 282, 39 Am. Dec. 76; *Ish v. Crane*, 8 Ohio St. 520; *Id.*, 13 Ohio St. 574; *Dick v. Page*, 17 Mo. 234, 57

The agency is also terminated by the death of the agent.<sup>9</sup> The authority is personal to him, and does not vest in his executors or administrators, unless, indeed, the authority is conferred upon them by the terms of the appointment. If, however, the authority is coupled with an interest, it survives.<sup>10</sup> The death of one of two or more joint agents,<sup>11</sup> or of a member of an agent firm,<sup>12</sup> unless by the terms of the appointment authority is conferred upon the survivors, also terminates the agency. The death of an agent terminates the authority of a subagent,<sup>13</sup> unless the agent was authorized to employ the subagent on the principal's behalf, and thus create privity of contract.<sup>14</sup>

### *Same—Insanity*

Where such a change occurs that the principal can no longer act for himself, the agent whom he has appointed can no longer act for him. Hence, if the principal becomes insane, it is said that the authority of the agent is thereby terminated.<sup>15</sup> It would be a more accurate statement of the rule to say that the act of the agent stands on the same footing as if performed by the insane principal, and may be valid, void, or voidable according to circumstances.<sup>16</sup> This rule is subject to the usual exception, if the authority is coupled with an interest.<sup>17</sup>

Am. Dec. 267; *Deweese v. Muff*, 57 Neb. 17, 77 N. W. 361, 42 L. R. A. 789, 73 Am. St. Rep. 488; *Story*, Ag. §§ 495-498i; *Wharton*, Ag. §§ 102-104. See *Farmers' Loan & Trust Co. v. Wilson*, *supra*, where it is said that the rule is unjust.

<sup>9</sup> *Johnson v. Johnson's Adm'rs*, *Wright* (Ohio) 594; *Gage v. Allison*, 1 Brev. (S. C.) 495, 2 Am. Dec. 682; *In re Merrick's Estate*, 8 Watts & S. (Pa.) 402. See, also, *Adriance v. Rutherford*, 57 Mich. 170, 23 N. W. 718; *Bristol Sav. Bank v. Holley*, 77 Conn. 225, 58 Atl. 691.

<sup>10</sup> *Harnickell v. Orndorff*, 35 Md. 341; *Collins v. Hopkins*, 7 Iowa, 463; *Merrin v. Lewis*, 90 Ill. 505; *Jones*, Mtg. § 1786.

<sup>11</sup> *Hartford Fire Ins. Co. v. Wilcox*, 57 Ill. 180; *Salisbury v. Brisbane*, 61 N. Y. 617.

<sup>12</sup> *Martine v. International Life Ins. Soc. of London*, 53 N. Y. 339, 13 Am. Rep. 529.

<sup>13</sup> *Perles v. Aycinena*, 3 Watts & S. (Pa.) 64; *Lehigh Coal & Navigation Co. v. Mohr*, 83 Pa. 228, 24 Am. Rep. 161; *Watt v. Watt*, 2 Barb. Ch. (N. Y.) 371.

<sup>14</sup> *Smith v. White*, 5 Dana (Ky.) 376; *Story*, Ag. § 490.

<sup>15</sup> *Drew v. Nunn*, 4 Q. B. D. 661; *Davis v. Lane*, 10 N. H. 156; *Matthiessen & Weichers Refining Co. v. McMahon's Adm'r*, 38 N. J. Law, 536; *Hill's Ex'rs v. Day*, 34 N. J. Eq. 150; *Bunce v. Gallagher*, 5 Blatchf. 481, Fed. Cas. No. 2,133; *Renfro v. City of Waco* (Tex. Civ. App.) 33 S. W. 766. *Yonge v. Toyubee*, [1910] 1 K. B. 215; *McKenna v. McArdle*, 191 Mass. 96, 77 N. E. 782.

<sup>16</sup> *Matthiessen & Weichers Refining Co. v. McMahon's Adm'r*, 38 N. J. Law, 536; *Merritt v. Merritt*, 43 App. Div. 68, 59 N. Y. Supp. 357. And perhaps the principal is always liable to a third person without notice. See p. 47, post.

<sup>17</sup> See same cases and *Vanmeter v. Darrach*, 115 Mo. 153, 22 S. W. 30; *Lundberg v. Davidson*, 72 Minn. 49, 74 N. W. 1018, 42 L. R. A. 103; *Laughlin v. Hibbin*, 129 Ind. 5, 27 N. E. 753.

It is laid down by all text-writers that the insanity of the agent terminates his authority, but the question does not appear to have been presented to the courts. It seems that third persons dealing with the agent in good faith, and in reliance upon his apparent authority, if they could not be restored to their former position, would be entitled to protection.<sup>18</sup>

*Same—Bankruptcy.*

The bankruptcy of the principal terminates the authority of the agent so far as relates to rights of property of which the principal is divested by the bankruptcy,<sup>19</sup> although as to other rights the authority is not affected;<sup>20</sup> nor is the authority revoked, if it be part of a security or coupled with an interest.<sup>21</sup> The revocation dates from the act of bankruptcy, provided an adjudication of bankruptcy follows, but the doctrine of relation is not allowed to defeat the rights of an intervening bona fide purchaser, who has no notice of the act of bankruptcy.<sup>22</sup>

The bankruptcy of the agent terminates his authority to receive money and do acts of a like nature,<sup>23</sup> but not to do merely formal acts.<sup>24</sup> Termination by bankruptcy of the agent appears to be a result of the implied intention of the principal, rather than a necessary consequence of his bankruptcy.

*Same—War*

War terminates all commercial intercourse between the belligerent countries, and hence a citizen of one country cannot appoint an agent in the other.<sup>25</sup> For the same reason war as a rule terminates an agency if the principal is a citizen of one country and the agent a citizen of the other;<sup>26</sup> but these results would seem to depend upon whether

<sup>18</sup> See Mechem, Ag. (2d Ed.) §§ 681-685.

<sup>19</sup> *Minett v. Forrester*, 4 Taunt. 541; *Parker v. Smith*, 16 East, 382; *In re Daniels*, 6 Biss. (U. S.) 405, Fed. Cas. No. 3,566; *Wilson v. Harris*, 21 Mont. 374, 54 Pac. 46 (assignment for benefit of creditors); *Elwell v. Coon* (N. J. Ch.) 46 Atl. 580 (assignment); *Story*, Ag. § 482.

<sup>20</sup> *Dixon v. Ewart*, 3 Meriv. 322.

<sup>21</sup> *Dixon v. Ewart*, 3 Meriv. 322; *Hall v. Bliss*, 118 Mass. 554, 19 Am. Rep. 476; post, p. 48.

<sup>22</sup> *Ex parte Snowball*, L. R. 7 Ch. 534, 548; *Elliot v. Turquand*, 7 App. Cas. 79.

Under the present United States Bankruptcy Act (Act July 1, 1898, c. 541, § 70, 30 Stat. 565 [U. S. Comp. St. 1916, § 9654]) the revocation would date from the adjudication.

<sup>23</sup> *Audenried v. Betteley*, 8 Allen (Mass.) 302.

<sup>24</sup> *Story*, Ag. § 486.

<sup>25</sup> *United States v. Grossmayer*, 9 Wall. (U. S.) 72, 19 L. Ed. 627. See *Williams v. Paine*, 169 U. S. 55, 18 Sup. Ct. 279, 42 L. Ed. 658.

<sup>26</sup> *New York Life Ins. Co. v. Davis*, 95 U. S. 425, 24 L. Ed. 453; *Same v. Statham*, 93 U. S. 24, 23 L. Ed. 789; *Ward v. Smith*, 7 Walk. (U. S.) 447, 19 L. Ed. 207; *Howell v. Gordon*, 40 Ga. 302.

in the particular case the maintenance of the relation of principal and agent would be inconsistent with the belligerent rights of the country in which the case arises.<sup>27</sup> An authority coupled with an interest is not terminated by reason that the principal is within the lines of the enemy;<sup>28</sup> nor, on principle, is an authority given as a security thereby terminated.

*Notice of Termination—Estoppel*

If the principal has held out an agent as such, he will be estopped to deny the agency as against third persons who may deal with the agent in reliance upon the apparent authority, notwithstanding termination of the agency by act of either party. The same result must of course follow notwithstanding termination of the authority by express or implied limitation,<sup>29</sup> or even, in some cases, by what has been termed operation of law. No estoppel in favor of third persons can arise if the agency has been terminated by death,<sup>30</sup> or by bankruptcy,<sup>31</sup> or adjudication of insanity, or where the exercise of the apparent authority would be illegal, as in case of war, because the publicity attending these events is presumptive notice to all persons.<sup>32</sup> Estoppel has been applied to the case of insanity of the principal,<sup>33</sup> and doubtless might be applied where the termination occurs through the insanity of the agent. Therefore, if the principal has recognized the authority of an agent in dealings with a third person, so as to create a representation of authority, the latter may rely on the continuance of the implied authority until he has received notice of its revocation; and, if a person

<sup>27</sup> *Williams v. Paine*, 169 U. S. 55, 18 Sup. Ct. 279, 42 L. Ed. 658.

"The mere fact of the breaking out of a war does not necessarily and as matter of law revoke every agency. Whether it is revoked or not depends upon the circumstances surrounding the case and the nature and character of the agency."

See *Robinson v. International Life Assur. Soc. of London*, 42 N. Y. 54, 1 Am. Rep. 400. *Sands v. New York Life Ins. Co.*, 50 N. Y. 626, 10 Am. Rep. 535.

<sup>28</sup> *Washington University v. Finch*, 18 Wall. (U. S.) 106, 21 L. Ed. 818; *Jones, Mtg.* § 1800.

<sup>29</sup> See cases cited ante, p. 41, note 88.

<sup>30</sup> Ante, p. 44.

<sup>31</sup> Except as to the rights of intervening bona fide purchasers before the adjudication. Ante, p. 46.

<sup>32</sup> *Mechem, Ag.* (2d Ed.) § 701.

<sup>33</sup> *Drew v. Nunn*, 4 Q. B. Div. 661. And see *Davis v. Lane*, 10 N. H. 156.

But it is not true estoppel, and the determination is referable to a broader principle. See p. 56.

The present English statute protects agent or third party who acts without notice of death, insanity, or bankruptcy. *Laws of Eng.* VI, p. 233. The Civil Code of Louisiana likewise, when agent acts without notice of death. Section 3032.

has been held out to the public as an agent, third persons may deal with him as such until the principal has given public notice that the general authority is withdrawn.<sup>34</sup> On the other hand, if an agent has been authorized merely to do a particular act, unless the principal has made representation creating an estoppel as against a particular person, notice to the agent is sufficient.<sup>35</sup>

In the same manner, an estoppel may arise in favor of the agent, where he acts without notice of the termination of his authority.<sup>36</sup>

### IRREVOCABLE AUTHORITY

13. Where an authority is given for a valuable consideration, to secure or effect some benefit, independent of the agent's compensation, it is irrevocable by act of the principal (and is not terminated by the death, insanity, or bankruptcy of either party, or by war).<sup>37</sup>

**EXCEPTION—DEATH OF PRINCIPAL**—An authority which is not coupled with an interest is terminated by the death of the principal.<sup>38</sup>

<sup>34</sup> *Anon. v. Harrison*, 12 Mod. 952; *Trueman v. Loder*, 11 Ad. & E. 589; *Pole v. Leask*, 33 L. J. Ch. 155; *Hatch v. Coddington*, 95 U. S. 48, 24 L. Ed. 339; *Southern Life Ins. Co. v. McCain*, 96 U. S. 84, 24 L. Ed. 653; *Tier v. Lampson*, 35 Vt. 179, 82 Am. Dec. 634; *Fellows v. Hartford & N. Y. Steamboat Co.*, 38 Conn. 197; *McNeilly v. Continental Life Ins. Co.*, 66 N. Y. 23; *Lamothe v. St. Louis Marine Ry. & Dock Co.*, 17 Mo. 204; *Wheeler v. McGuire*, 86 Ala. 398, 5 South. 190, 2 L. R. A. 808.

"The notice of revocation of the agency is governed by the same rules as notice of the dissolution of a partnership." *Clafin v. Lenheim*, 66 N. Y. 301, 305.

<sup>35</sup> *Watts v. Kavanagh*, 35 Vt. 34; *Strachan v. Muxlow*, 24 Wis. 21.

<sup>36</sup> In *Jones v. Hodgkins*, 61 Me. 480, where a commission merchant sold and delivered goods intrusted to him for sale before notice of a sale to another buyer by the principal, the agent was not liable to the principal in trover. "Undoubtedly," said Appleton, C. J., "a sale of property in the hands of a commission merchant employed to sell such property is a revocation—is an act revoking the authority given. But so long as it remains unknown to the commission merchant he is not bound by it." See ante, p. 42.

<sup>37</sup> The rule that an authority, although given as a security, terminates by the constituent's death, while supported by weight of authority, is based upon highly artificial reasoning. It is submitted that an authority given as a security, although not coupled with an interest, is not terminated by the occurrence of any of the events above enumerated (except the death of the principal), whose occurrence would cause a bare power to terminate by operation of law. Their occurrence might, indeed, often render it difficult or impossible to enforce the security without resort to the courts; but the authority ought not to be held to have terminated because of the difficulty, or even impossibility, of exercising it in the constituent's name.

<sup>38</sup> Cf. *Bowstead*, Ag. § 129.



Although, as a rule, the principal may, at his pleasure, revoke the authority of an agent, it is possible for the principal to confer upon the agent or a third person such a right to the continuance of the authority as to render it irrevocable.

If an authority is conferred upon a person, on sufficient consideration, for the purpose of securing or effecting some benefit to him, independent of his compensation as agent, such an authority is irrevocable. The authority, however, does not survive the death of the principal unless it is vested in one in whom is also vested such an interest or estate in the thing which is the subject of the authority that it can be exercised in his own name; in other words, unless the authority is, as the term is employed in the United States, "coupled with an interest." In England, while the rule in respect to irrevocable authorities appears to be substantially the same as in the United States, the term "coupled with an interest" is employed in a different sense, and is applied to any authority in the execution of which the person invested with it has such an interest or right as to make it irrevocable.<sup>39</sup> In other words, in England "authority coupled with an interest" is coextensive with "irrevocable authority." It is perhaps owing to the different meaning which is attached to the term "authority coupled with an interest" by different courts that there is some confusion in the cases in respect to the nature of the right or interest which renders an authority irrevocable.

It must always be borne in mind that, to make the authority irrevocable, the benefit sought to be secured or effected must be something more than the mere advantage or profit which the agent as such will derive from the continuance of the authority. The profit that will accrue to the agent by way of compensation for his services, even if he is to receive a share of the proceeds, as of a sale or collection to be made by him, is not sufficient.<sup>40</sup> Nor, unless the interest is otherwise sufficient, is an authority irrevocable because it is a term of the con-

<sup>39</sup> *Terwilliger v. Ontario, C. & S. R. Co.*, 149 N. Y. 86, 43 N. E. 432, per *Andrews, C. J.*; *Mechem, Ag.* (2d Ed.) § 573.

<sup>40</sup> *Blackstone v. Buttermore*, 53 Pa. 266; *Hartley's Appeal*, 53 Pa. 212, 91 Am. Dec. 207; *Oregon & W. Mortg. Sav. Bank v. American Mortg. Co.* (C. C.) 35 Fed. 22; *Hall v. Gambrill* (C. C.) 88 Fed. 709; *Chambers v. Seay*, 73 Ala. 372; *Gilbert v. Holmes*, 64 Ill. 548; *Frink v. Roe*, 70 Cal. 296, 11 Pac. 820; *Simpson v. Carson*, 11 Or. 361, 8 Pac. 325; *Darrow v. St. George*, 8 Colo. 592, 9 Pac. 791; *Ballard v. Travellers' Ins. Co.*, 119 N. C. 187, 25 S. E. 956; *Willcox & G. Sewing Mach. Co. v. Ewing*, 141 U. S. 627, 12 Sup. Ct. 94, 35 L. Ed. 882; *Frith v. Frith*, [1906] App. Cas. 254.

The fact that the agent was entitled to commissions on rents collected did not create an authority coupled with an interest. *Farmers' Loan & Trust Co. v. Wilson*, 139 N. Y. 284, 34 N. E. 784, 36 Am. St. Rep. 696.

tract of employment that it shall be irrevocable.<sup>41</sup> In such cases the law deems that the agent is sufficiently protected by his right of action for breach of the contract.

*Same—Hunt v. Rousmanier*

The leading case on the subject of irrevocable authority in the United States is *Hunt v. Rousmanier*.<sup>42</sup> In that case Hunt loaned money to Rousmanier, who executed his notes for the amount, and a day or two after executed a power of attorney authorizing Hunt to execute a bill of sale of Rousmanier's interest in a certain vessel to himself or any other person, and to collect any insurance money that might become due in the event of the vessel being lost. The instrument also recited that the power was given for collateral security for payment of the notes, and was to be void on their payment, but that in case of non-payment Hunt was to pay the notes out of the proceeds, and return the residue. It was held that the power, since it contained no words of conveyance or assignment, was not coupled with an interest, and hence that, although it would have been irrevocable by Rousmanier, it expired on his death. Accordingly it is declared that in order to constitute "an authority coupled with an interest" the agent must have more than a mere interest by way of security in the exercise of the authority; that he must have an interest in the thing which is the subject of the authority, and not a mere interest in that which is produced by its exercise.<sup>43</sup> And it is held, on the one hand, that an authority given upon sufficient consideration, for the purpose of securing to or conferring upon the agent some benefit, independent of his compensation—as where an agent is authorized to sell real or personal property<sup>44</sup> or to collect a claim<sup>45</sup> and apply the proceeds to the payment of a debt, or is authorized to confess judgment<sup>46</sup>—is irrevocable by

<sup>41</sup> *Blackstone v. Buttermore*, 53 Pa. 266; *Walker v. Denison*, 86 Ill. 142; *Flanagan v. Brown*, 70 Cal. 254, 11 Pac. 706; *Woods v. Hart*, 50 Neb. 497, 70 N. W. 53.

<sup>42</sup> 8 Wheat. 174, 5 L. Ed. 589; s. c., 1 Pet. 1, 7 L. Ed. 27.

<sup>43</sup> *State of Missouri v. Walker*, 125 U. S. 339, 8 Sup. Ct. 929, 31 L. Ed. 769; *Stier v. Imperial Life Ins. Co. (C. C.)* 58 Fed. 843; *Johnson Railroad Signal Co. v. Union Switch & Signal Co. (C. C.)* 59 Fed. 20. And see cases cited in notes 40 and 41, *supra*.

<sup>44</sup> *Posten v. Rasette*, 5 Cal. 467; *Hutchins v. Hebbard*, 34 N. Y. 27; *Denson v. Thurmond*, 11 Ark. 586; *Gausen v. Morton*, 10 B. & C. 731; *Terwilliger v. Ontario, C. & S. R. Co.*, 149 N. Y. 86, 43 N. E. 432. *Contra*: *Mansfield v. Mansfield*, 6 Conn. 559, 16 Am. Dec. 76.

A power to enter upon and sell and convey land, given for a consideration of \$5, held irrevocable. *Montague v. McCarroll*, 15 Utah, 318, 49 Pac. 418.

<sup>45</sup> *Marziou v. Pioche*, 8 Cal. 522.

<sup>46</sup> *Kindig v. March*, 15 Ind. 248.

Otherwise if without consideration, and not as security for a debt. *Evans v. Fearn*, 16 Ala. 689, 50 Am. Dec. 197.

the act of the principal; and, on the other hand, that unless the authority is "coupled with an interest," as above defined, the authority terminates upon the death of the principal,<sup>47</sup> but that if it is coupled with an interest it survives.<sup>48</sup>

In the former case, it is said that the agent has "an interest, not amounting to a property or estate in the thing itself, but still an interest in the existence of the power or authority to act with reference to it, not for the purpose of earning a commission by the exercise of the power, but because the agent has parted with value, or incurred liability, or assumed obligations, at the principal's request or with his consent, looking to the exercise of the power as a means of reimbursement, indemnity, or protection."<sup>49</sup>

In accordance with this distinction, it has been held that the power of sale in an ordinary mortgage, being coupled with an interest or estate, is not revoked by the death of the mortgagor;<sup>50</sup> but in some states where by statute a mortgage is declared to be a mere security for debt, passing no title or estate in the land to the mortgagee, the power of sale has been held to be incapable of execution after the death of the mortgagor.<sup>51</sup> An authority which is coupled with an interest is not revoked by the bankruptcy<sup>52</sup> or insanity<sup>53</sup> of the princi-

<sup>47</sup> *McGriff v. Porter*, 5 Fla. 373; *Huston's Adm'r v. Cantril*, 11 Leigh (Va.) 136; *Houghtaling v. Marvin*, 7 Barb. (N. Y.) 412; *Weaver v. Richards*, 144 Mich. 395, 108 N. W. 382, 6 L. R. A. (N. S.) 855. But see following note.

Where to secure a loan the borrower executed an instrument authorizing the lender on default in payment to enter and take away and sell certain slaves, and from the proceeds pay himself, returning the overplus, the power was revoked by the grantor's death. *McGriff v. Porter*, 5 Fla. 373..

<sup>48</sup> *Leavitt v. Fisher*, 11 N. Y. Super. Ct. 1; *Houghtaling v. Marvin*, 7 Barb. (N. Y.) 412. See *Willingham v. Rushing*, 105 Ga. 72, 31 S. E. 130.

In *Hunt v. Rousmanier* the court appears to have had much hesitation in reaching such a conclusion, two appeals having been taken to the Supreme Court on the same point. 8 Wheat. 174, 5 L. Ed. 589, and 1 Pet. 1, 7 L. Ed. 27. The court appears to have misinterpreted the English precedents; for in England the law is otherwise. *Halsbury's Laws of England*, VI, § 489. *Houghtaling v. Marvin* and *Weaver v. Richards*, supra, are contra to the leading case, although they cite it with approval.

<sup>49</sup> *Mechem*, Ag. (2d Ed.) p. 406.

<sup>50</sup> *Varnum v. Meserve*, 8 Allen (Mass.) 158; *Bergen v. Bennett*, 1 Caines, Cas. (N. Y.) 1, 2 Am. Dec. 281; *Berry v. Skinner*, 30 Md. 567; *Hudgins v. Morrow*, 47 Ark. 515, 2 S. W. 104; *Harvey v. Smith*, 179 Mass. 592, 61 N. E. 217 (chattel mortgage); *Jones*, Mtg. § 1792.

<sup>51</sup> *Wilkins v. McGehee*, 86 Ga. 764, 13 S. E. 84; *Johnson v. Johnson*, 27 S. C. 309, 3 S. E. 606, 13 Am. St. Rep. 636. General rule contra. *Jones*, Mtg. (7th Ed.) § 1792.

<sup>52</sup> *Hall v. Bliss*, 118 Mass. 554, 19 Am. Rep. 476.

Where the owner of shares of stock in a national bank delivered his cer-

<sup>53</sup> *Berry v. Skinner*, 30 Md. 567; ante, p. 45.

pal, or by war; <sup>54</sup> and it would seem that the result would be the same if the authority were given as a security so as to be irrevocable by act of the principal, although not, strictly speaking, coupled with an interest. <sup>55</sup>

*Same—Authority for Benefit of Third Person*

It is not necessary, in order to render an authority irrevocable, that it be vested in the person to be benefited by its exercise, but the beneficiary may be a third person. <sup>56</sup> Thus, where a debtor authorizes another to sell property and to pay the proceeds to a creditor, the authority becomes irrevocable upon the creditor's acceptance of the security. <sup>57</sup> If the authority is accompanied by a conveyance or assignment of an interest, the authority is not revoked by the principal's death. <sup>58</sup> So, if a debtor, having funds in the hands of an agent, authorizes him to pay the debtor's creditor, and the agent promises the creditor to pay him or to hold the funds to his use, the principal can no longer revoke the authority, nor would it be revoked by his death. <sup>59</sup>

*Same—Authority to Discharge Liability Incurred by Agent*

While an authority conferred for the benefit of the principal, and not as a means of securing some benefit to the agent, is ordinarily revocable, an authority may become irrevocable if its continuance is necessary to secure the agent against liability already incurred in favor of a third person. It is true that the principal must indemnify the agent for any loss sustained or liability incurred in the course of the agency, and this is ordinarily the agent's sole protection or security. But if an agent is employed to do an act involving personal

tificate, together with a power of attorney to transfer the same, to secure his note, the power was coupled with an interest, and was not revoked by the bankruptcy of the constituent. *Dickinson v. Central Nat. Bank*, 129 Mass. 279, 37 Am. Rep. 351. See, also, *Crowfoot v. Gurney*, 9 Bing. 372; ante, p. 46.

<sup>54</sup> Ante, p. 46.

<sup>55</sup> Ante, p. 49.

<sup>56</sup> *Walsh v. Whitcomb*, 2 Esp. 565; *Kindig v. March*, 15 Ind. 248 (warrant of attorney to confer judgment).

<sup>57</sup> *American Loan & Trust Co. v. Billings*, 58 Minn. 187, 59 N. W. 998.

<sup>58</sup> *Hunt v. Rousmanier*, 8 Wheat. (U. S.) 174, 5 L. Ed. 589.

Where a deed or a power of attorney executed by a member of an underwriters' association authorized the agent to adjust and pay losses, and provided for a deposit of money by the members with the agent, which was a trust fund for protection of the insured, the power was coupled with an interest, and was not revoked by death of a member as to losses under policies issued during his lifetime. *Durbrow v. Eppens*, 65 N. J. Law, 10, 46 Atl. 582.

<sup>59</sup> *Crowfoot v. Gurney*, 9 Bing. 372; *Hodgson v. Anderson*, 3 B. & C. 842; *Goodwin v. Bowden*, 54 Me. 425; *Simonton v. First Nat. Bank of Minneapolis*, 24 Minn. 216.

liability, and is given authority to discharge the liability on behalf of the principal, it would be manifestly unjust to permit the principal to revoke the authority after the liability has been incurred, at least without fully indemnifying the agent. For example, if an agent is authorized to make a contract in his own name, and to discharge it out of moneys of the principal in his hands, the authority to use the funds for that purpose becomes irrevocable as soon as the contract has been entered into, provided that the principal does not himself discharge the contract or provide other funds, or at least secure the agent against loss. The authority in this case is sometimes called "a power coupled with an obligation." It does not differ essentially from the previous cases, where the "interest" exists, not in the subject-matter, but only by way of security.<sup>60</sup>

### SCOPE OF AUTHORITY

14. The scope of an agent's authority includes, not only acts which are within his actual authority, but acts which are within his apparent authority and acts which purport to be within his actual or apparent authority, unless the third person has notice that the agent is exceeding his actual authority.

"Apparent authority," as the term is commonly used, includes authority to do whatever is usual and necessary to carry into effect the principal power conferred upon the agent and to transact the business which he is employed to transact.

#### *Apparent Authority—When Principal is Bound Independently of Estoppel*

The power of an agent to render his principal liable upon a contract, or to bind him by a representation, may be far broader than his actual authority. A person may be estopped to deny that another

<sup>60</sup> See *Mechem, Ag.* (2d Ed.) § 579; *Read v. Anderson*, 10 Q. B. D. 100, affirmed 13 Q. B. D. 781; *Hess v. Rau*, 95 N. Y. 359, affirming 17 J. D. S. 324. Cf. *Seymour v. Bridge*, 14 Q. B. D. 460; *Perry v. Barnett*, 15 Q. B. D. 460; *Tatam v. Reeve*, [1893] 1 Q. B. 44; *Anson, Contr.* 359; *Chapman v. Bates*, 61 N. J. Eq. 658, 47 Atl. 638, 88 Am. St. Rep. 459; *Wiger v. Carr*, 131 Wis. 584, 111 N. W. 657, 11 L. R. A. (N. S.) 650, 11 Ann. Cas. 998.

"There is a qualification of the rule where the agent has entered upon the execution of the authority before revocation, and has so bound himself that a retraction of the authority would subject him to liability. In such cases the principal cannot revoke the authority as to the part of the transaction remaining unexecuted, at least not without indemnifying the agent." Per *Andrews, C. J.*, in *Terwilliger v. Ontario, C. & S. R. Co.*, 149 N. Y. 86, 43 N. E. 432.

See *Story, Ag.* §§ 446, 447; *Huffcut, Ag.* (2d Ed.) 87, 89; *Bowstead, Dig. Ag.* 321.

person is his agent; or, if an agency actually exists, may be estopped to deny that an act is within the authority actually conferred. Independently of a technical estoppel, however, the principal may be bound by the acts of his agent in excess of the authority actually conferred upon him. Indeed, in most cases where the principal is bound by acts in excess of the actual authority the liability rests, not upon a technical estoppel, but upon the doctrine of agency, by which the principal is liable for all the acts of his agent which are, or purport to be, within the scope of the authority usually confided to an agent employed to transact the business which the agent is employed to transact, notwithstanding limitations upon that authority which are not disclosed to those with whom the agent deals.<sup>61</sup>

### *Same—Illustrations*

For example, the principal is bound by a warranty given by an agent whom he has authorized to make sales if the warranty is a usual one, although he has instructed the agent not to warrant, provided the buyer was not aware of this limitation, the power to warrant in the usual manner being within the agent's "apparent" or "ostensible" authority.<sup>62</sup> Again, if a principal authorizes his agent to buy cotton on

<sup>61</sup> *Watteau v. Fenwick* [1893] 1 Q. B. 346. See, also, *Whitehead v. Tuckett*, 15 East, 400; *Smith v. McGuire*, 3 H. & N. 554; *Edmunds v. Bushell*, 1 Q. B. 97; *Butler v. Maples*, 9 Wall. (U. S.) 766, 19 L. Ed. 822; *Gowen v. Bush*, 22 C. C. A. 196, 76 Fed. 349; *Daylight Burner Co. v. Odlin*, 51 N. H. 56, 12 Am. Rep. 45; *Putnam v. French*, 53 Vt. 402, 38 Am. Rep. 682; *Lobdell v. Baker*, 1 Metc. (Mass.) 193, 35 Am. Dec. 358; *Byrne v. Massasoit Packing Co.*, 137 Mass. 313; *Rathbun v. Snow*, 123 N. Y. 343, 25 N. E. 379, 10 L. R. A. 355; *Trainer v. Morison*, 78 Me. 160, 3 Atl. 185, 57 Am. Rep. 790; *Law v. Stokes*, 32 N. J. Law, 249, 90 Am. Dec. 655; *Williams v. Getty*, 31 Pa. 461, 72 Am. Dec. 757; *Lister v. Allen*, 31 Md. 543, 100 Am. Dec. 78; *Wheeler v. McGuire*, 86 Ala. 398, 5 South. 190, 2 L. R. A. 808; *Fatman v. Leet*, 41 Ind. 133; *Baker v. Barnett Produce Co.*, 113 Mich. 533, 71 N. W. 866; *Bentley v. Doggett*, 51 Wis. 224, 8 N. W. 155, 37 Am. Rep. 827; *Watts v. Howard*, 70 Minn. 122, 72 N. W. 840; *Oberne v. Burke*, 30 Neb. 581, 46 N. W. 838; *Kelly v. Jersey City Water Supply Co.*, 74 N. J. Law, 734, 67 Atl. 108; *Murphy v. W. H. & F. W. Cane*, 82 N. J. Law, 557, 82 Atl. 854, Ann. Cas. 1913D, 643; *Small v. Housman*, 208 N. Y. 115, 101 N. E. 700; *Lowenstein v. Lombard, Ayres & Co.*, 164 N. Y. 324, 58 N. E. 44; *Harnboro v. Burnand*, [1904] 2 K. B. 10.

"Every agency carries with it, or includes in it, the authority to do whatever is usual and necessary to carry into effect the principal power, and the principal cannot restrict his liability for acts of the agent within the apparent scope of his authority by private instructions not communicated to those with whom he deals." *Watts v. Howard*, 70 Minn. 122, 72 N. W. 840, per Mitchell, J.

<sup>62</sup> *Dingle v. Hare*, 7 C. B. (N. S.) 145; *Nelson v. Cowing*, 6 Hill (N. Y.) 336; *Ahern v. Goodspeed*, 72 N. Y. 108; *Randall v. Kehler*, 60 Me. 37, 11 Am. Rep. 169; *Reese v. Bates*, 91 Va. 321, 26 S. E. 865; *Dayton v. Hooglund*, 39 Ohio St. 671; *Talmage v. Bierhauser*, 103 Ind. 270, 2 N. E. 716; *Pickert v. Marston*, 68 Wis. 465, 32 N. W. 550, 60 Am. Rep. 876; *Westurn v. Page*, 94 Wis. 251,

his behalf, instructing him in no case to pay more than a certain price, the principal is bound by a contract of purchase, although the agent exceeds his instructions in respect to the price, if the limitation upon his authority is not disclosed to the seller, since the power to fix a price is within the scope of the authority usually confided to an agent employed in that character.<sup>63</sup> So, where a person who traveled about selling his own goods was authorized to sell the plaintiff's goods upon commission, and it was a usual incident to that general authority to fix the terms of sale, including the time, place, and mode of delivery and the price of the goods, and the time and mode of payment, and the agent sold goods on credit, which were forwarded by the principal addressed to the buyer, marked C. O. D., by express, it was held that the defendant expressman, being without notice of the agent's want of authority, was justified in delivering the goods upon the agent's order without payment. "We have a case, then," said the court, "where the agent was apparently clothed with the authority to sell the plaintiff's goods, without limitation as to the quantity, and on commission, for cash or on credit, as he might think proper; and, this being so, Moore must be regarded, in respect to third persons, as the plaintiff's general agent, whose authority would not be limited by instructions not brought to the notice of such third persons. As Moore, then, in respect to third persons, had the power to sell on credit, the authority to control the delivery \* \* \* would necessarily come within the scope of his agency; and we think his order to the defendant would justify a delivery of the goods without payment, unless he had notice of the agent's want of authority. As to him the agent's apparent authority was real authority."<sup>64</sup> So, where an agent was employed to travel about the country and sell goods by sample, power to hire horses and carriages for the transportation of the agent and his samples being necessarily incident to the business required to be done, it was held that the principal was liable to a liveryman who furnished such transportation to the agent, although, unknown to the liveryman, the principal had supplied the agent with money and forbidden him to pledge his credit. "From the nature of the business required to be done by their agent," said the court, "the defendants held out to those who might have occasion to deal with him that he had the right to contract for the use of teams and carriages necessary and convenient for

68 N. W. 1003; *McCormick v. Kelly*, 28 Minn. 135, 9 N. W. 675; *Case Threshing-Mach. Co. v. McKinnon*, 82 Minn. 75, 84 N. W. 646.

<sup>63</sup> *Butler v. Maples*, 9 Wall. (U. S.) 766, 19 L. Ed. 822. See, also, *Nunnally v. Goodwin* (Tenn. Ch. App.) 39 S. W. 855; *Maloney v. Hudson River Water Power Co.*, 133 App. Div. 499, 117 N. Y. Supp. 601.

<sup>64</sup> *Daylight Burner Co. v. Odlin*, 51 N. H. 56, 12 Am. Rep. 45.

doing such business, in the name of his principals, if he saw fit, in the way such service is usually contracted for.”<sup>65</sup>

*Same—Basis of Liability*

The use of the words “apparent” or “ostensible” in this connection is somewhat misleading, for it implies that the binding effect upon the principal of an act within the scope of the agent’s apparent or ostensible authority in such cases rests upon the doctrine of estoppel. And the same may be said of the frequent use in this connection of the phrase “holding out,” as it is used in the passage last quoted. Estoppel, indeed, is not infrequently asserted to be the basis of the doctrine of agency under consideration;<sup>66</sup> but the explanation, it is submitted, is inadequate. The basis of an agency by estoppel must be a representation of authority on the part of the principal, and reliance upon the authority represented to exist on the part of the third person. Yet in the class of cases now under consideration both elements may be lacking.

The liability of the principal for the acts of his agent within the scope of his “apparent” authority, as the term is here used, must rest, therefore, not upon a technical estoppel, but upon a broader doctrine of agency, that a principal is liable for acts of his agent which are within the ordinary and usual scope of the business he is employed to transact, notwithstanding undisclosed limitations upon that apparent authority—a doctrine which applies even when the very existence of the agency is undisclosed.<sup>67</sup> Thus, where the defendants carried on the business of a beer house by means of an agent, who conducted it in his own name, it was held that they were liable to the plaintiff for cigars and other articles such as would usually be supplied to and dealt in at such an establishment, supplied to the agent, although the plaintiff gave credit only to him, and he had been forbidden to buy such articles on credit.<sup>68</sup>

<sup>65</sup> *Bentley v. Doggett*, 51 Wis. 224, 8 N. W. 155, 37 Am. Rep. 827; *Rexroth v. Holloway*, 45 Ind. App. 36, 90 N. E. 87.

<sup>66</sup> *Ewart, Estoppel*; *Huffcut*, Ag. p. 66 et seq., p. 128 et seq.; *Johnston v. Milwaukee & W. Inv. Co.*, 46 Neb. 480, 64 N. W. 1100; *First Nat. Bank of Hastings v. Farmers’ & Merchants’ Bank*, 56 Neb. 149, 76 N. W. 430. See dicta in *Holt v. Schneider*, 57 Neb. 523, 77 N. W. 1086; *Small v. Housman*, 208 N. Y. 115, 101 N. E. 700. Against this view, see 13 Green Bag, 50; 15 Harv. L. R. 324.

<sup>67</sup> *Watteau v. Fenwick*, [1893] 1 Q. B. 346; *Kinnahan v. Parry*, [1910] 2 K. B. 389; *Brooks v. Shaw*, 197 Mass. 376, 84 N. E. 110; *McCracken v. Hamburger*, 139 Pa. 326, 20 Atl. 1051; *Ernst v. Harrison* (Sup.) 86 N. Y. Supp. 247.

For full discussion and citation, see *Mechem*, Ag. (2d Ed.) § 1767.

<sup>68</sup> *Watteau v. Fenwick* [1893] 1 Q. B. 346. “Once it is established,” said *Wills, J.*, “that the defendant was the real principal, the ordinary doctrine as to principal and agent applies—that the principal is liable for all the acts of



It is true that in many cases all the elements of a technical estoppel may exist, but it is by no means necessary that they do exist, to charge the principal, within this doctrine.<sup>69</sup>

*Same—General and Special Agent*

It must be conceded that the rule that the principal is bound by the acts of his agent within the scope of his apparent or usual authority, notwithstanding undisclosed limitations, is commonly said to apply only to "general" agents. The principal is bound, it is said, by the acts of his general agent, acting within the scope of his general authority, although in violation of his private instructions;<sup>70</sup> but the authority of a "special" agent must be strictly pursued, and if he exceeds his limited authority the principal is not bound.<sup>71</sup>

Agents are said to be divided, in respect to the extent of their authority, into "universal," "general," and "special" agents. A universal agent has been defined as one "appointed to do all the acts which his principal can personally do, and which he may lawfully delegate the

the agent which are within the authority usually confided to an agent of that character, notwithstanding limitations, as between the principal and the agent, put upon that authority. It is said that it is only so where there has been a holding out of authority, which cannot be said of a case where the person supplying the goods knew nothing of the existence of a principal. But I do not think so. Otherwise, in every case of undisclosed principal, or, at least, in every case where the fact of there being a principal was undisclosed, the secret limitation of the authority would prevail and defeat the action of the person dealing with the agent, and then discovering that he was an agent and had a principal. But in case of a dormant partner it is clear law that no limitation as between the dormant and active partner will avail the dormant partner as to things within the ordinary authority of a partner. The law of partnership is, on such a question, nothing but a branch of the general law of principal and agent, and it appears to me to be undisputed and conclusive on the point now under discussion."

<sup>69</sup> See Mechem, Ag. (2d Ed.) § 720 et seq.

<sup>70</sup> Fenn v. Harrison, 3 T. R. 757; Whitehead v. Tuckett, 15 East, 400; Butler v. Maples, 9 Wall. (U. S.) 766, 19 L. Ed. 822; Allen v. Ogden, 1 Wash. C. C. (U. S.) 174, Fed. Cas. No. 233; Rossiter v. Rossiter, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62; Munn v. Commission Co., 15 Johns. (N. Y.) 44, 8 Am. Dec. 219; Lobdell v. Baker, 1 Metc. (Mass.) 202, 35 Am. Dec. 358; Markey v. Mutual Ben. Life Ins. Co., 103 Mass. 78, 92; Daylight Burner Co. v. Odlin, 51 N. H. 56, 12 Am. Rep. 45; Williams v. Getty, 31 Pa. 461, 72 Am. Dec. 757; Adams Exp. Co. v. Schlessinger, 75 Pa. 246; Lister v. Allen, 31 Md. 543, 100 Am. Dec. 78; Manning v. Gasharie, 27 Ind. 399; Cruzan v. Smith, 41 Ind. 293; Blackwell v. Ketcham, 53 Ind. 186; City of Davenport v. Peoria Marine & Fire Ins. Co., 17 Iowa, 276; Palmer v. Cheney, 35 Iowa, 281; Rockford Ins. Co. v. Nelson, 65 Ill. 415; English v. Ayer, 79 Mich. 516, 44 N. W. 942; Montgomery Furniture Co. v. Hardaway, 104 Ala. 100, 16 South. 29; Cullinan v. Bowker, 180 N. Y. 93, 72 N. E. 911; Butterick Pub. Co. v. Boynton, 191 Mass. 175, 77 N. E. 705; Coughlin v. Knights of Columbus, 79 Conn. 218, 64 Atl. 223.

<sup>71</sup> See same cases.

power to another to do.”<sup>72</sup> Such an agency, says Story, “may potentially exist; but it must be of the very rarest occurrence.”<sup>73</sup> This term is seldom met with, and universal agents call for no discussion.

A general agent is usually defined as one authorized to act for his principal in all matters concerning a particular business or employment or of a particular nature. A special agent is usually defined as one authorized to do a particular act or to act in a single transaction. “The distinction between the two kinds of agencies is that the one is created by power given to do acts of a class, and the other by power given to do individual acts only.”<sup>74</sup> Yet while this distinction is commonly said to indicate the dividing line between general and special agents, there is by no means universal agreement in the use of the terms. For example, the term “general agent” is sometimes said to apply to, or to include, any professional or customary agent, such as an attorney, broker, factor, or auctioneer, although he may be employed only in a single transaction.<sup>75</sup> Under this use of the term a broker employed in a single transaction is a general agent, while if the distinction usually drawn is correct he is a special agent. Sometimes, even, the difference is made to turn upon whether or not the authority, even though it be to do a particular thing, is strictly limited as to the mode of doing it.<sup>76</sup> If the power of an agent to bind his principal by acts within the scope of his apparent authority turned in reality upon whether his agency were general or special, it is obvious that accurate definitions of the terms would be essential, and, indeed, would have been worked out long ago by the courts. It is, however, very generally admitted at the present day that the distinction is unsatisfactory. Clearly, a broker or other customary agent is a special agent, as sometimes defined; but a broker employed in a single transaction has power to bind his principal within the scope of the ordinary authority of a broker employed in such a transaction, notwithstanding private or undisclosed instructions limiting that au-

<sup>72</sup> Story, Ag. § 21.

<sup>73</sup> Id. See *Gulick v. Grover*, 33 N. J. Law, 463, 97 Am. Dec. 728.

<sup>74</sup> *Butler v. Maples*, 9 Wall. (U. S.) 776, 19 L. Ed. 822. See, also, cases cited in note 70, supra; *Dowden v. Cryder*, 55 N. J. Law, 329, 26 Atl. 941; *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 16 N. Y. 129, 69 Am. Dec. 678.

<sup>75</sup> *Paley, Ag. (Lloyd's Ed.)* 199, note; *Evans, Ag.* 102; *Bowstead, Dig. Ag. art. 1.* See *Lobdell v. Baker*, 1 Metc. (Mass.) 193, 35 Am. Dec. 358; *Bell v. Offutt*, 10 Bush (Ky.) 632; *Lister v. Allen*, 31 Md. 543, 100 Am. Dec. 78.

<sup>76</sup> Story, Ag. § 18.

“A special agent is one employed for a particular purpose only. He also may have a general authority to accomplish that purpose, or be limited to do it in a particular manner.” *Bryant v. Moore*, 26 Me. 84, 45 Am. Dec. 96, per *Shepley, J.*

thority.<sup>77</sup> And even a special agent who is not a customary agent may bind his principal by acts within the ordinary and usual scope of the business confided to him, notwithstanding undisclosed limitations. That this is so, if the instructions are intended to be kept secret, and not communicated by the agent to those with whom he may deal, is clear.<sup>78</sup> But it is believed that the rule is not confined to cases where the instructions limiting the usual or apparent authority of a special agent are intended to be kept secret.<sup>79</sup>

It is doubtless true that the usual and necessary powers which are incidental to the principal power are ordinarily fewer in the case of an agent employed to act in a single transaction than in the case of an agent employed to act in all matters concerning a particular business.<sup>80</sup> But upon principle the power of the agent in such cases to bind his

<sup>77</sup> *Markham v. Jaudon*, 41 N. Y. 239; *Skiff v. Stoddard*, 63 Conn. 198, 26 Atl. 874, 28 Atl. 104, 21 L. R. A. 102; *Brewster v. Van Liew*, 119 Ill. 554, 8 N. E. 842.

<sup>78</sup> *Hatch v. Taylor*, 10 N. H. 538; *Towle v. Leavitt*, 23 N. H. 360, 55 Am. Dec. 195.

"No man is at liberty to send another into the market to buy or sell for him as agent, with secret instructions as to the manner in which he shall execute his agency, which are not to be communicated to those with whom he is to deal; and then, when his agent has deviated from these instructions, to say that he was a special agent, that the instructions were limitations upon his authority; and that those with whom he dealt in the matter of the agency acted at their peril, because they were bound to inquire, where inquiry would have been fruitless, and to ascertain that of which they were not to have knowledge." *Hatch v. Taylor*, 10 N. H. 538.

"It is so even in the case of a special agent; as, for instance, if a man sends his servant to market to sell goods, or a horse, for a certain price, and the servant sells them for less, the master is bound by it. There even the violation of a particular authority does not render the sale null and void." *Smith v. McGuire*, 3 H. & N. 554, per Pollock, C. B.

"These principles apply as well to special as to general agents. An agent with authority to sell or buy has authority to sell or buy in the usual manner." *Watts v. Howard*, 70 Minn. 122, 72 N. W. 840.

<sup>79</sup> Mr. Mechem's conclusion is that "apparent authority" of both general and special agents is unaffected, not only by secret instructions and limitations, but also by limitations that are unusual and not to be anticipated. *Mechem, Ag.* (2d Ed.) §§ 734, 735. As, for example, where an open resolution of a board of directors appointing a general business manager provides that he shall not pledge the credit of the company. See *Rathbun v. Snow*, 123 N. Y. 343, 25 N. E. 379, 10 L. R. A. 355.

<sup>80</sup> *Blackwell v. Ketcham*, 53 Ind. 184; *Chicago & G. W. Railroad Land Co. v. Peck*, 112 Ill. 408; *Gilbert v. Deshon*, 107 N. Y. 324, 14 N. E. 318; *Milne v. Kleb*, 44 N. J. Eq. 378, 14 Atl. 646. See *Mechem, Ag.* (2d Ed.) p. 523.

Where a special agent authorized to buy cotton of a designated person at a certain place bought cotton of equal value and quality of other persons in a different locality, the principal was not bound. *Robinson Mercantile Co. v. Thompson*, 74 Miss. 847, 21 South. 794.

principal by acts in excess of his actual authority does not turn upon whether the agency is general or special, but upon whether the powers which he assumes to exercise are such usual and necessary powers as would be implied in the absence of any indication of a contrary intention as incidental to the principal power, provided, of course, that the person seeking to hold the principal had not notice of the terms of the actual authority.

*Same—Notice of Limitations upon Apparent Authority*

The burden of proof is upon the person dealing with any one as an agent, through whom he seeks to charge another as principal, to show that the agency did exist, and that the agent had the authority, real or apparent, which he assumed to exercise, or otherwise that the alleged principal is estopped from disputing the agency. A person dealing with any one as an agent who has not been held out as such deals at his peril, and if he does not apply to the alleged principal to ascertain whether an agency exists, and to what extent, he takes the risk of its existence, and of its extent.<sup>81</sup> It is not in the power of an agent to establish or enlarge his authority by his own declarations.<sup>82</sup> Nevertheless, if an agency did exist, the third person can charge the principal for any act of the agent within the scope of his authority, although he made no inquiry; and the scope of the authority, as between the principal and a third person who had no notice of unusual limitations, will be measured by the powers which would ordinarily be implied and included in such an agency.<sup>83</sup> By failing to inquire, the third person does not take the risk of unusual limitations; it is enough to protect him that he had not notice of such limitations, and it is for

<sup>81</sup> *Pole v. Leask*, 33 L. J. (N. S.) Ch. 155, per Lord Cranworth. See, also, *Schimmelpennich v. Bayard*, 1 Pet. (U. S.) 264, 7 L. Ed. 138; *Hatch v. Taylor*, 10 N. H. 547; *Murdock v. Mills*, 11 Metc. (Mass.) 5; *Lister v. Allen*, 31 Md. 543, 100 Am. Dec. 78; *Hurley v. Watson*, 68 Mich. 531, 36 N. W. 726; *Rice v. Peninsular Club*, 52 Mich. 87, 17 N. W. 708; *Berry v. Anderson*, 22 Ind. 36; *Davidson v. Porter*, 57 Ill. 300; *Chaffe v. Stubbs*, 37 La. Ann. 656; *Dozier v. Freeman*, 47 Miss. 647; *Booth v. Litchfield*, 201 N. Y. 466, 94 N. E. 1078, 35 L. R. A. (N. S.) 710.

Slight evidence is sufficient to make a *prima facie* case. *Mullen v. J. J. Quinlan & Co.*, 195 N. Y. 109, 87 N. E. 1078, 24 L. R. A. (N. S.) 511.

Where an agent was appointed by resolution expressed by words in *præsentî*, but intended to not take effect till certain stages of the business were completed, the agent could not bind the company by holding himself out as agent to one who relied merely on his representations, without knowledge of the resolution. *Rathbun v. Snow*, 123 N. Y. 343, 25 N. E. 379, 10 L. R. A. 355.

<sup>82</sup> Post, p. 76.

<sup>83</sup> *Daylight Burner Co. v. Odlin*, 51 N. H. 56, 12 Am. Rep. 45; *Bentley v. Doggett*, 51 Wis. 224, 8 N. W. 155, 37 Am. Rep. 827; *Butler v. Maples*, 9 Wall. (U. S.) 766, 19 L. Ed. 822.

the principal to show that he had such notice.<sup>84</sup> And this rule applies as well to cases where the third person has dealt with the agent without any direct holding out on the part of the principal as to cases where the principal has directly held him out as having authority.

On the other hand, if the person dealing with an agent has notice that he is exceeding his actual authority, such person cannot charge the principal.<sup>85</sup> In cases resting upon estoppel this must be so from the very nature of an estoppel. And although the liability of the principal for acts of his agent within the ordinary and usual scope of the business delegated does not rest upon a technical estoppel, nevertheless it is an essential element of the doctrine of agency on which the liability rests that no limitation upon the ordinary and usual authority of such an agent be disclosed.<sup>86</sup> Of course, if the third person has been actually informed of limitations he cannot hold the principal beyond the authority so limited.<sup>87</sup> Knowledge of the limitations, however, is not essential; it is enough if he have notice, actual or constructive.<sup>88</sup> Actual notice is communicated by knowledge of circumstances sufficient to put him as a reasonable man upon inquiry, which if pursued would lead to knowledge of the limitations.<sup>89</sup> Such notice would be communicated by a previous course of dealing between the parties indicating unusual limitations.<sup>90</sup> And if the act which the agent assumes to do is one for which the law requires authority in writing, or under seal, or of record, the person dealing with the agent will be charged constructively with notice of the conditions and limitations of the authority.<sup>91</sup> So the assured is affected with constructive notice

<sup>84</sup> *Bentley v. Doggett*, 51 Wis. 224, 8 N. W. 155, 37 Am. Rep. 827. And see cases cited in note 80, *supra*.

<sup>85</sup> *In re Kern's Estate*, 176 Pa. 373, 35 Atl. 231; *Littleton v. Loan, Mercantile & Stock Ass'n*, 97 Ga. 172, 25 S. E. 826; *Park Hotel Co. v. Fourth Nat. Bank*, 30 C. C. A. 409, 86 Fed. 742 (notice that agent is contracting with himself).

<sup>86</sup> *Ante*, p. 53. *et seq.*

<sup>87</sup> *Strauss v. Francis*, L. R. 1 Q. B. 379; *Wood Mowing Mach. Co. v. Crow*, 70 Iowa, 340, 30 N. W. 609.

<sup>88</sup> *Howard v. Braithwaite*, 1 Ves. & B. 202, 209; *Collen v. Gardner*, 21 Beav. 540.

<sup>89</sup> See *Daylight Burner Co. v. Odlin*, 51 N. H. 56, 12 Am. Rep. 45; *Gilbert v. Deshon*, 107 N. Y. 324, 14 N. E. 318; *Brown v. West*, 69 Vt. 440, 38 Atl. 87; *In re Selman Heating & Plumbing Co. (D. C.)* 203 Fed. 777; *Perry v. Smith*, 29 N. J. Law, 74; *Huie v. Allen*, 87 Hun, 516, 34 N. Y. Supp. 577, affirmed 156 N. Y. 658, 50 N. E. 1118 (agent uses principal's check to pay own debt).

<sup>90</sup> *Ante*, p. 6.

<sup>91</sup> *Backman v. Charlestown*, 42 N. H. 125; *Peabody v. Hoard*, 46 Ill. 242; *Lewis v. Bourbon County Com'rs*, 12 Kan. 186; *Reese v. Medlock*, 27 Tex.

of restrictions, contained in his policy, upon the authority of the agent to waive conditions of the policy, although the assured has not read the policy.<sup>92</sup> By the law merchant, a signature "per procuracionem" on a bill of exchange, promissory note, or check operates as constructive notice that the agent had only a limited authority to sign, and the principal is bound only if the agent in signing was acting within the actual limits of his authority.<sup>93</sup> A restrictive indorsement operates as constructive notice;<sup>94</sup> and hence, when a bill or note is indorsed "for collection," this gives notice that the indorsee is merely agent for collection, and has not the legal title.<sup>95</sup>

*Same—Condition of Exercise of Power Peculiarly within Knowledge of Agent—Estoppel*

Where, by a power of attorney, the agent is authorized to exercise the authority upon a certain condition, or in a certain event, as to incur indebtedness not exceeding at any one time a certain amount, it has been held in some cases that the person dealing with the agent must, at his peril, ascertain the existence of the fact upon which the right to exercise the power depends, and cannot rely upon the representation of the agent that the fact exists.<sup>96</sup> A different rule, however, obtains in many jurisdictions, where it is held that when the authority

120, 84 Am. Dec. 611; *Clement v. Young-McShea Amusement Co.*, 70 N. J. Eq. 677, 67 Atl. 82, 118 Am. St. Rep. 747.

<sup>92</sup> *Quinlan v. Providence Washington Ins. Co.*, 133 N. Y. 356, 31 N. E. 31, 28 Am. St. Rep. 645; *Tiffany, Ag.* p. 219.

<sup>93</sup> *Stagg v. Elliott*, 12 C. B. N. S. 373, 381; *Attwood v. Munnings*, 7 B. & C. 278; *Alexander v. McKenzie*, 6 C. B. 766; *In re Floyd Acceptances*, 7 Wall. (U. S.) 666, 19 L. Ed. 169; *Nixon v. Palmer*, 8 N. Y. 398; *Pope v. Bank of Albion*, 57 N. Y. 126.

The letters "p. p. a." added to the signature, are evidence of notice that the agent professes to act per power of attorney. *Mt. Morris Bank v. Gorham*, 169 Mass. 519, 48 N. E. 341.

"The purpose of a written power of attorney is not to define the authority of the agent as between himself and his principal, but to evidence the agent's authority to third parties." *Keyes v. Metropolitan Trust Co. of City of New York*, 220 N. Y. 237, 115 N. E. 455.

<sup>94</sup> *Ancher v. Bank*, 2 Doug. 63; *Treuttel v. Barendon*, 8 Taunt. 100.

<sup>95</sup> *Lloyd v. Sigourney*, 5 Bing. 525; *Commercial Nat. Bank v. Armstrong*, 148 U. S. 50, 13 Sup. Ct. 533, 37 L. Ed. 363; *Manufacturers' Nat. Bank v. Continental Bank*, 148 Mass. 553, 20 N. E. 193, 2 L. R. A. 699, 12 Am. St. Rep. 598; *Freeman's Nat. Bank v. National Tube-Works*, 151 Mass. 413, 24 N. E. 779, 8 L. R. A. 42, 21 Am. St. Rep. 461; *National Butchers' & Drovers' Bank v. Hubbell*, 117 N. Y. 384, 22 N. E. 1031, 7 L. R. A. 852, 15 Am. St. Rep. 515; *Merchants' Nat. Bank v. Hanson*, 33 Minn. 40, 21 N. W. 849, 53 Am. Rep. 5. See *Norton, B. & N.* (4th Ed.) p. 438.

<sup>96</sup> *Mussey v. Beecher*, 3 Cush. (Mass.) 511. See, also, *Lowell Five Cents Savings Bank v. Inhabitants of Winchester*, 8 Allen (Mass.) 109; *Craycraft v. Selvage*, 10 Bush (Ky.) 696. But see *Montaignac v. Shitta*, 15 App. Cas. 357.

of the agent depends upon some fact outside the terms of the power, which from its nature rests peculiarly within his knowledge, the principal is bound by the representation of the agent, although false, as to the existence of such fact.<sup>97</sup> In accordance with this rule, it was held in a leading case that where, by the terms of a power of attorney, the authority of the agent to issue negotiable paper was expressly limited (as it would, indeed, have been limited by implication) to the business of the principal, and the agent exercised the power to raise money for his own benefit, but ostensibly for the benefit of his principal, the principal was equitably estopped to deny that the authority had been pursued.<sup>98</sup>

The principle of this decision is of wide application,<sup>99</sup> and the failure of many courts to recognize it or to apply it in all cases has resulted in much conflict of authority, as is illustrated in cases involving bills of lading. It is not within the usual powers of the master of a ship or of the shipping agent of a carrier to issue bills of lading for goods not received, and the extent of his authority, real and ap-

<sup>97</sup> The principle which is here recognized was stated in a leading case as follows: "Where the principal has clothed his agent with power to do an act resting upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith, pursuant to the apparent power may rely upon the representation, and the principal is estopped from denying its truth to his prejudice." *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30.

<sup>98</sup> *North River Bank v. Aymar*, 3 Hill (N. Y.) 262. See, also, *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 16 N. Y. 125, 69 Am. Dec. 678; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30, maintaining the authority of *North River Bank v. Aymar*, supra.

If the defendant seeks to repudiate the representation because it is false, the plaintiff may answer: "You intrusted your agent with means effectually to deceive me by doing an act which in all respects compared with the authority you gave, and which act represented that an extrinsic fact known to your agent or yourself, but unknown to me, existed, and you have thus enabled your agent, by falsehood, to deceive me, and must bear the consequences. The very power you gave, since it could not be exercised without a representation, has led me into this position, and therefore you are estopped in justice to deny his authority in this case." *New York & N. H. R. Co. v. Schuyler*, per Dwight, J.

<sup>99</sup> It would seem to include all cases where the agent is committing a fraud upon his principal, but purports to act within his authority. See pp. 70-73.

Where the proper officer of a bank fraudulently certifies a check, the bank is bound as against a bona fide holder. *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 14 N. Y. 623; *Id.*, 16 N. Y. 125, 69 Am. Dec. 678; *Meads v. Merchants' Bank of Albany*, 25 N. Y. 143, 82 Am. Dec. 331; *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. (U. S.) 604, 646, 650, 19 L. Ed. 1008.

parent,<sup>1</sup> is therefore to issue bills only for goods actually received. It follows that the consignee or indorsee for value of a bill of lading acts at his own risk as respects the existence of the fact upon which alone the agent has authority to issue the bill, and that, when the agent has fraudulently and collusively or by mistake issued a bill without receiving the goods, the principal is not liable upon the contract, unless he is liable by virtue of an equitable estoppel. The earlier English rule,<sup>2</sup> which is followed by many courts of this country,<sup>3</sup> denies his liability, but his liability is maintained by courts which give full application to the principle in question.<sup>4</sup> While the former rule is a plausible application of the doctrine of agency, its fault lies in the assumption that there is a duty on the part of the person dealing with the agent of ascertaining the existence of the fact upon which the right to exercise the power depends. Since the fact is peculiarly within the knowledge of the agent, it cannot reasonably be expected that the other party should prosecute his inquiries beyond the agent himself; and indeed, since the very exercise of the power is implicit with a representation that the fact exists, it cannot be expected that the other party should make any inquiry at all.<sup>5</sup>

The objections to the doctrine of estoppel, as here applied, have already been mentioned.<sup>6</sup> It is not ordinary estoppel, but estoppel on

<sup>1</sup> "Apparent," as usually defined, does not include acts which are outside the known limits of authority, as for example, an act which is not done for the benefit of the principal. See definition on p. 53.

<sup>2</sup> *Grant v. Norway*, 10 C. B. 665; *Coleman v. Riches*, 16 C. R. 104 [wharfinger giving receipt for goods not received]; *Cox v. Bruce*, 18 Q. B. D. 147.

These cases appear to be overruled in principle but not expressly by *Lloyd v. Grace, Smith & Co.*, [1912] A. C. 716. See pp. 71-73. *Hambro v. Burnand* was decided on their authority ([1903] 2 K. B. 399), and reversed in the Court of Appeal ([1904] 2 K. B. 10). *Grant v. Norway* is disapproved by Lord Robertson in *Whitechurch v. Cavanagh*, [1902] App. Cas. 117.

<sup>3</sup> *Pollard v. Vinton*, 105 U. S. 7, 26 L. Ed. 998; *Friedlander v. Railway Co.*, 130 U. S. 416, 9 Sup. Ct. 570, 32 L. Ed. 991; *Sears v. Wingate*, 3 Allen (Mass.) 103; *Baltimore & O. R. Co. v. Wilkens*, 44 Md. 11, 22 Am. Rep. 26; *Dean v. King*, 22 Ohio St. 118; *Williams v. Railroad Co.*, 93 N. C. 42, 53 Am. Rep. 450; *Louisiana Nat. Bank v. Laveille*, 52 Mo. 380; *National Bank of Commerce v. Railroad Co.*, 44 Minn. 224, 46 N. W. 342, 560, 9 L. R. A. 263, 20 Am. St. Rep. 566; *Alexander Eccles & Co. v. Louisville & N. R. Co.* (D. C.) 198 Fed. 898.

<sup>4</sup> *Armour v. Michigan Cent. R. Co.*, 65 N. Y. 111, 22 Am. Rep. 603; *Bank of Batavia v. New York, L. E. & W. R. Co.*, 106 N. Y. 195, 12 N. E. 433, 60 Am. Rep. 440; *Brooke v. New York, L. E. & W. R. Co.*, 108 Pa. 529, 1 Atl. 206, 56 Am. Rep. 235; *St. Louis & I. M. R. Co. v. Larned*, 103 Ill. 293; *Sioux City & Pac. R. Co. v. First Nat. Bank*, 10 Neb. 556, 7 N. W. 311, 35 Am. Rep. 488; *Wichita Sav. Bank v. Atchison, T. & S. F. R. Co.*, 20 Kan. 519; *Fletcher v. Great Western Elevator Co.*, 12 S. D. 643, 82 N. W. 184.

<sup>5</sup> *Mechem, Ag.* (2d Ed.) § 760.

<sup>6</sup> *Ante* p. 56.



grounds of public policy,<sup>7</sup> and, in fact, is nothing more than an invocation of the principle of policy which is the basis of the entire rule of respondeat superior.<sup>8</sup> It would be more satisfactory to rest the determination of these and analogous cases upon the broader ground that the principal is liable for the acts of his agent which purport to be within the scope of his authority,<sup>9</sup> without regard to any undisclosed fraud or error on the part of the agent.

*Same—Acts Which Purport to be within the Scope of Authority*

It will be observed that apparent authority, as heretofore considered and as generally defined, does not include acts which merely purport to be within the scope of authority, but which are neither actually authorized nor necessary, usual, or incidental to the powers actually conferred. Such acts may be divided into two classes, although the first class probably includes the second:<sup>10</sup> (1) Those which have been described under the last heading; and (2) those which are not done for the principal's benefit. The former have already been discussed and the conflicting results noted. The latter, as well as the former, will be further considered under the head of fraud, where such cases usually arise. Suffice it now to state that on principle and probably by the weight of authority the employer is liable for such acts. Where, for example, as in the illustration on page 55, it is within the apparent authority of a traveling salesman to hire a conveyance on his principal's credit, his undisclosed intention to use the conveyance merely for his own purposes is not material;<sup>11</sup> and where a bank cashier checks out the funds of his bank, ostensibly within the scope of his actual authority, but really for his own benefit, the bank is none the less responsible.<sup>12</sup>

<sup>7</sup> "There are cases in which the doctrine of estoppel may be rested on broad grounds of public policy." Dwight, C., in *Poillon v. Secor*, 61 N. Y. 456.

"You are estopped in justice to deny his authority in this case." *New York & N. H. R. Co. v. Schuyler*. See quotations ante, p. 63.

<sup>8</sup> See note 22, p. 67, post.

<sup>9</sup> See *Mechem, Ag.* (2d Ed.) § 760. See, also, post, pp. 70-73.

<sup>10</sup> The second class differs from the first, if at all, only in that the extrinsic fact (see p. 63, ante) always is that the act be done for the benefit of the principal. That there is no distinction, see *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30, at page 69.

<sup>11</sup> See *Rexroth v. Holloway*, 45 Ind. App. 36, 90 N. E. 87.

<sup>12</sup> *Phillips v. Mercantile Nat. Bank*, 140 N. Y. 556, 35 N. E. 982, 23 L. R. A. 584, 37 Am. St. Rep. 596; *Fillebrown v. Hayward*, 190 Mass. 472, 77 N. E. 45.

So where agent issues commercial paper for own benefit. In *re Troy & Cohoes Shirt Co. (D. C.)* 136 Fed. 420, affirmed 142 Fed. 1038, 73 C. C. A. 523. Or buys. *Bond v. Gibson*, 1 Camp. 185. Or borrows. *Donnell v. Lewis County Sav. Bank*, 80 Mo. 165.

See *Hambro v. Burnand*, [1904] 2 K. B. 10.

*Same—Public Agent*

The rule that a principal is bound by the acts of his agent, acting within the scope of his general authority, although he acts in violation of special instructions, does not apply to public agents.<sup>13</sup> This rests partly upon the ground that the powers and duties of public agents are defined and limited by public law, of which persons dealing with such agents are charged with notice;<sup>14</sup> and also upon the ground of public policy, "for the reason that it is better that an individual should occasionally suffer from the mistakes of public officers or agents than to adopt a rule which, through improper combinations or collusion, might be turned to the detriment and injury of the public."<sup>15</sup>

**LIABILITY OF PRINCIPAL FOR TORT OF AGENT****15. The principal is liable for the tort of his agent, committed when acting within the scope of his authority.***Liability of Principal for Tort of Agent in General*

The rule which governs the liability of the principal for the torts of his agent is usually declared to be the same as that which governs the liability of the master for the torts of his servant; but in cases involving fraud this statement, it is believed, requires qualification.

A servant is acting within the scope, or in the course, of his employment when he is engaged in that which he was employed to do and is at the time about his master's business. He is not acting in the course of his employment if he is engaged in some pursuit of his own. Not every deviation from the strict execution of his duty is such an interruption of the course of employment as to suspend the master's responsibility; but, if there is a total departure from the course of the master's business, the master is no longer answerable for the servant's conduct.<sup>16</sup> Thus a servant employed to drive a delivery wagon does not necessarily cease to be acting in the course of his employment because to suit his own convenience he takes a roundabout way; but if he starts upon an entirely new journey, whether at the begin-

<sup>13</sup> *Lee v. Munroe*, 7 Cranch. (U. S.) 366, 3 L. Ed. 373; *Whiteside v. United States*, 93 U. S. 247, 23 L. Ed. 882; *Delafield v. State of Illinois*, 26 Wend. (N. Y.) 192.

<sup>14</sup> *Mayor etc., of Baltimore v. Eschbach*, 18 Md. 276, 282; *New York & C. S. S. Co. v. Harbison* (D. C.) 16 Fed. 681; *Id.* (C. C.) 691.

<sup>15</sup> *Whiteside v. United States*, 93 U. S. 247, 23 L. Ed. 882.

<sup>16</sup> *Mitchell v. Crasweller*, 13 C. B. 237; *Joel v. Morison*, 6 C. & P. 501; *Story v. Ashton*, L. R. 4 Q. B. 476; *Ayrigg's Ex'rs v. New York & E. R. Co.*, 30 N. J. Law, 460; *Stone v. Hills*, 45 Conn. 44, 29 Am. Rep. 635.

ning or end or middle of his proper duty, on his own account, he is no longer in the course of his employment.<sup>17</sup> If he is employed as clerk, and without permission drives the master's delivery wagon, plainly he is not acting in the course of his employment.<sup>18</sup> And so where he employs a means which is unusual and extravagant, as where a street car conductor violently hurls a departing female passenger from the car, in order to expedite his master's business.<sup>19</sup> And if the servant commits an intentional wrong for an independent purpose, the master is not liable, even though the very act that constitutes the servant's wrong at the same time advances the master's business, as where the servant drives his master's vehicle against his own enemy,<sup>20</sup> or, in sprinkling his master's lawn, mischievously turns the hose upon a person crossing the lawn.<sup>21</sup>

### *Same—Ground of Liability*

It is manifest that this rule differs somewhat from that governing the liability of the principal for his agent's contract or representative act. The power of the servant to subject his master to liability for tort is not affected by any knowledge which the third person may have of the extent of the servant's authority. He is not dealing with the servant. It is enough to give him a right of action that he is injured by the servant's act, and that the act was committed while the latter was engaged in what he was employed to do and in furtherance of the employment. The reason for the master's vicarious liability is not clear;<sup>22</sup> but a

<sup>17</sup> *Burns v. Poulson*, L. R. 8 C. P. 563; *Stevens v. Woodward*, 6 Q. B. 318; *Staples v. Schmid*, 18 R. I. 224, 26 Atl. 193, 19 L. R. A. 824; *Ritchie v. Waller*, 63 Conn. 155, 28 Atl. 29, 27 L. R. A. 161, 38 Am. St. Rep. 361.

<sup>18</sup> *Petersen v. Hubbell*, 12 App. Div. 372, 42 N. Y. Supp. 554.

<sup>19</sup> *Isaacs v. Third Ave. R. Co.*, 47 N. Y. 122, 7 Am. Rep. 418. In this case the defendant was liable on another ground. *Stewart v. Brooklyn & C. R. R. Co.*, 90 N. Y. 594, 43 Am. Rep. 185. See *Mechem, Ag.* (2d Ed.) § 1960. But see *Jackson v. American Telephone & Telegraph Co.*, 139 N. C. 347, 51 S. E. 1015, 70 L. R. A. 738, where this principle is overlooked.

<sup>20</sup> *Mott v. Consumer's Ice Co.*, 73 N. Y. 543; *Limpus v. London General Omnibus Co.*, 1 H. & C. 526. See *Mechem, Ag.* (2d Ed.) § 1960.

<sup>21</sup> *Evers v. Krouse*, 70 N. J. Law, 653, 58 Atl. 181, 66 L. R. A. 592.

<sup>22</sup> See *Tiff.*, Ag. p. 10; *Mechem, Ag.* (2d Ed.) p. 1552.

There is no general agreement or authoritative recognition of the principle of justice on which the rule of respondeat superior rests. Perhaps, however, it may be briefly stated by saying that he who creates a risk should assume it, as in the case of master and third person; or, where two independent persons take part in the creation of the risk, that he should assume it who can the better anticipate and guard against it (see suggestions to this effect by *Shaw, C. J.*, in *Farwell v. Boston, etc., R. R.*, 4 Metc. 49, and by Lord Macnaghten in *Lloyd v. Grace, Smith & Co.*, [1912] A. C. 716, at page 738). The question under the rule of respondeat superior always appears to be whether the loss falls within the risk which the superior assumes when he puts forward the agent or servant.

similar principle of liability is applied to agency, except that in defining the limits of its application it becomes necessary to substitute "scope of authority" for "scope of employment." It is to be borne in mind that in the case of agency the person injured by the representation is dealing with the agent and by him induced to act; and therefore it is the appearance of authority, rather than the actual limits of employment, that the law regards.

Obviously one and the same person may be employed both as an agent and as a servant, with a consequent broadening of the field of employer's liability in tort. But where a person is employed merely as an agent, his power of subjecting his employer to liability for torts is comparatively narrow. In most cases, an agent's tort arises only in a false representation, and hence the main question in respect to the principal's liability in tort relates to fraud.

#### *Liability for Fraud—In General*

It follows from the considerations just stated that if, in furtherance of the business committed to him, the agent commits a fraud by making a false representation which belongs to the class of representations that, as against the person dealing with him, he must be deemed to have authority to make, the principal is answerable.<sup>23</sup> Whether the principal is answerable, if the representation is made as an inducement to an authorized contract, but does not belong to a class of representations which he would be deemed to have authority to make as a term of the contract—as where an agent authorized to sell makes a representation which would not be binding as a warranty because such a warranty would be unusual—is a question upon which there has been difference of opinion.<sup>24</sup> In many cases where the principal is held liable for the fraud of his agent made as an inducement to a sale, the question does not arise because the representation is of a class which the agent has apparent authority to make. An agent authorized to effect a sale of property "must be presumed to possess authority to make such representations in regard to its quality and condition as usually accompany such transactions."<sup>25</sup> The rule, however, in this

<sup>23</sup> *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259; *Mayer v. Dean*, 115 N. Y. 556, 22 N. E. 261, 5 L. R. A. 540; *Griswold v. Gebbie*, 126 Pa. 353, 17 Atl. 673, 12 Am. St. Rep. 878; *Mick v. Corporation of Royal Exch. Assur. of London, Eng.*, 87 N. J. Law, 607, 91 Atl. 102.

<sup>24</sup> *Udell v. Atherton*, 7 H. & N. 172.

In this case one employed by defendants to sell timber on commission sold plaintiff a defective mahogany log, which he fraudulently represented to be sound, defendants being unaware of the defect or of the representation. In an action for deceit the court directed a nonsuit, and the court in banc was equally divided whether the ruling should be sustained.

<sup>25</sup> *Mayer v. Dean*, 115 N. Y. 556, 22 N. E. 261, 5 L. R. A. 540, per Ruger,

country at least, is usually stated in broader terms, and it is declared that it is sufficient to charge the principal for the agent's fraud that the agent is acting in the business which he is authorized to transact, and that the representation is made in that transaction and as an inducement to the other party to act. Thus, where an agent is authorized to sell, his false representation concerning the property, made as an inducement to the purchaser, binds the seller, who is liable to the purchaser in an action of tort for deceit.<sup>26</sup> "While the principal may not have authorized the particular act [the representation], he has put the agent in his place to make the sale, and must be responsible for the manner in which he has conducted himself in doing the business which the principal intrusted to him."<sup>27</sup> "Having given such authority, the principal is responsible for the fraudulent as well as the fair means used by the agent, if they are in the line of accomplishing the object of the agency."<sup>28</sup> If when the representation is made the agent is not engaged in a transaction within the scope of his authority, the principal is not answerable for it.<sup>29</sup> The principal cannot, however, "reap the fruit of his agent's fraud and escape liability by denying the agent's authority; he cannot retain the benefits derived from the fraudulent

C. J. In this case it was held that, while a written contract for sale of goods by sample cannot be shown by oral evidence to be made with warranty when none is set out in the contract, the statements of the broker falsely recommending the quality are admissible to prove fraud. See, also, *Griswold v. Gebbie*, 126 Pa. 353, 17 Atl. 673, 12 Am. St. Rep. 878.

The court in *Mayer v. Dean* takes the view that a fraudulent representation is none the less within the scope of authority because the agent has no apparent power to warrant such a representation, which, it is believed, is just.

<sup>26</sup> *Jeffrey v. Bigelow*, 13 Wend. (N. Y.) 518, 28 Am. Dec. 476; *Locke v. Stearns*, 1 Metc. (Mass.) 560, 35 Am. Dec. 382; *White v. Sawyer*, 16 Gray (Mass.) 586; *Haskell v. Starbird*, 152 Mass. 117, 25 N. E. 14, 23 Am. St. Rep. 809; *Rhoda v. Annis*, 75 Me. 17, 46 Am. Rep. 354; *Peebles v. Patapsco Guano Co.*, 77 N. C. 233, 24 Am. Rep. 447; *Wolfe v. Pugh*, 101 Ind. 293; *Busch v. Wilcox*, 82 Mich. 315, 46 N. W. 940; *Gunther v. Ullrich*, 82 Wis. 220, 52 N. W. 88, 33 Am. St. Rep. 32; *Hopkins v. Hawkeye Ins. Co.*, 57 Iowa, 203, 10 N. W. 605, 42 Am. Rep. 41; *Lynch v. Mercantile Trust Co. (C. C.)* 18 Fed. 486.

The representation must be made in the particular transaction. *Cate v. Blodgett*, 70 N. H. 316, 48 Atl. 281.

<sup>27</sup> *Haskell v. Starbird*, 152 Mass. 117, 25 N. E. 14, 23 Am. St. Rep. 809, per *Devens, J.*

<sup>28</sup> *Wolfe v. Pugh*, 101 Ind. 293.

<sup>29</sup> *Lamm v. Port Deposit Homestead Ass'n of Cecil County*, 49 Md. 233, 33 Am. Rep. 246; *Second Nat. Bank of St. Paul v. Howe*, 40 Minn. 390, 42 N. W. 200, 12 Am. St. Rep. 744; *Browning v. Hinkle*, 48 Minn. 544, 51 N. W. 605, 31 Am. St. Rep. 691; *Thayer v. Schley*, 137 App. Div. 166, 121 N. Y. Supp. 1064; *Stimpson v. Achorn*, 158 Mass. 342, 33 N. E. 518.

conduct of the agent without being charged with the instrumentalities used to accomplish the purpose.”<sup>80</sup>

In line with this reasoning it has been held and frequently asserted by way of dicta that, even though the principal is not liable in contract or tort for an unauthorized misrepresentation of his agent, nevertheless, if an authorized contract is procured by such means, either party may rescind it.<sup>81</sup>

The result of the authorities appears to be that the principal is chargeable with any fraud that is a means of procuring a contract which is within the scope of the authority, as that term has already been explained, unless the means are so unusual or extravagant that no reasonable principal could justly be expected to anticipate and guard against them,<sup>82</sup> or unless they constitute an unauthorized collateral contract not purporting to be within the agent's authority.<sup>83</sup>

#### *Fraud Not for Principal's Benefit*

Whether the principal is liable when the fraud is not committed for his benefit is a question as to which there has been much uncertainty and conflict, although as pointed out in two of the leading cases on the

<sup>80</sup> *Bennett v. Judson*, 21 N. Y. 238; *Krumm v. Beach*, 96 N. Y. 398; *Sunbury Fire Ins. Co. v. Humble*, 100 Pa. 495; *Busch v. Wilcox*, 82 Mich. 336, 47 N. W. 328, 21 Am. St. Rep. 563; *Ripley v. Case*, 86 Mich. 261, 49 N. W. 46; *Albitz v. Minneapolis & Pac. Ry. Co.*, 40 Minn. 476, 42 N. W. 394; *Leavitt v. Sizer*, 35 Neb. 80, 52 N. W. 832; *Continental Ins. Co. v. Insurance Co. of State of Pennsylvania*, 2 C. C. A. 535, 51 Fed. 884.

*Cf. Smith v. Tracy*, 36 N. Y. 79; *Baldwin v. Burrows*, 47 N. Y. 199; ante, p. 66 et seq.

<sup>81</sup> *Rackemann v. Riverbank Imp. Co.*, 167 Mass. 1, 44 N. E. 990, 57 Am. St. Rep. 427; *National Iron Armor Co. v. Bruner*, 19 N. J. Eq. 331; *Reitman v. Fiorillo*, 76 N. J. Law, 815, 72 Atl. 74; *Bennett v. Judson*, 21 N. Y. 238; *Schiffer v. Anderson*, 146 Fed. 457, 76 C. C. A. 667; *Providence Jewelry Co. v. S. Fessler*, 145 Iowa, 74, 123 N. W. 957. And see *Pollock on Torts* (8th Ed.) p. 303.

<sup>82</sup> *Henry v. Allen*, 151 N. Y. 1, 45 N. E. 355, 36 L. R. A. 658. Here an agent, authorized to invest the funds of his principal, deposited them from time to time with a private banker in his own name and subject to his own check, receiving in return the banker's negotiable checks under a fraudulent agreement that he would not negotiate them, but would hold them as vouchers. He indorsed the banker's checks to his principal, drew out the funds, and absconded. Held, that the principal was not liable for the fraud, because it was so unusual and extravagant that it did not purport to be within the agent's authority. See *Isaacs v. Third Ave. R. Co.*, on p. 67, ante, embodying the same principle.

<sup>83</sup> *Wheeler v. Northwestern Sleigh Co. (C. O.)* 39 Fed. 347. An agent to sell corporate stock fraudulently pretends to be the owner and sells it, together with dividends previously declared. Held, that the principal was not responsible for the sale of the dividends.

subject,<sup>34</sup> those cases which assert the negative of the proposition are cases in which the agent's act under discussion was not in other respects within the scope of authority. Many of the judges, influenced by the analogy to the liability of a master for the tort of his servant, have declared such a fraud to be without the scope of employment, because the agent has lost sight of his employer's interest and is pursuing a purpose entirely his own; but this view appears to disregard the difference between the wrong of a servant and that of an agent.

In England the uncertainty has been finally removed by the recent case of *Lloyd v. Grace, Smith & Co.* in the House of Lords.<sup>35</sup> In that case a client consulted the managing clerk of a solicitor, in the course of his employment, with reference to changing her investments. On the advice of the clerk, she transferred her property to him, and he appropriated it to his own use in pursuance of a fraudulent design, which he had entertained from the beginning. The court, reversing the decision below and reviewing many cases, held that the principal was liable and laid down what is believed to be the true rule—that the principal is liable to the person dealt with for the acts of his agent which purport to be within the scope of his authority, without regard to the private motives of the agent or the doctrine of estoppel. The principal, it is said, "clothed him with his own authority," "he put him in his place to do that class of acts," and the principal is responsible for any act of the agent which purports to be within the scope of that kind of an agency.

The requirement that the fraud must be for the principal's benefit in order to be within the scope of the agent's authority has been approved in many opinions in American cases<sup>36</sup> and disapproved in others, often in the same jurisdiction. Doubtless the weight of authority accords with the English rule.<sup>37</sup> The question is presented (1) where

<sup>34</sup> *Lloyd v. Grace Smith & Co.*, [1912] App. Cas. 716, 741; *Phillips v. Mercantile Nat. Bank*, 140 N. Y. 556, 563, 35 N. E. 982, 23 L. R. A. 584, 37 Am. St. Rep. 596.

<sup>35</sup> [1912] App. Cas. 716.

<sup>36</sup> *Friedlander v. Texas & P. R. Co.*, 130 U. S. 416, 9 Sup. Ct. 570, 32 L. Ed. 991; *Dun v. City Nat. Bank*, 7 C. C. A. 152, 58 Fed. 174, 23 L. R. A. 687; *Henry v. Allen*, 151 N. Y. 1, 11, 45 N. E. 355, 36 L. R. A. 658.

<sup>37</sup> *Phillips v. Mercantile Nat. Bank*, 140 N. Y. 556, 35 N. E. 982, 23 L. R. A. 584, 37 Am. St. Rep. 596; *Birkett v. Postal Tel. Cable Co.*, 107 App. Div. 115, 94 N. Y. Supp. 918, affirmed 186 N. Y. 591, 79 N. E. 1101; *Mick v. Corporation of Royal Exch. Assur. of London, Eng.*, 87 N. J. Law, 607, 91 Atl. 102, 52 L. R. A. (N. S.) 1074; *Hambleton v. Rhind*, 84 Md. 456, 36 Atl. 597, 40 L. R. A. 216; *Bank of Palo Alto v. Pacific Postal Tel. Cable Co. (C. C.)* 103 Fed. 841; *In re Troy & Cohoes Shirt Co. (D. C.)* 136 Fed. 420, affirmed 142 Fed. 1038, 73 C. C. A. 523.

the agent has authority to do a certain act in his principal's business and fraudulently does the act for his own benefit, or for the benefit of some person other than his principal;<sup>38</sup> and (2) in cases where the agent has authority to do an act in the event of the existence of some extrinsic fact resting peculiarly within his own knowledge, and for his own benefit, or for the benefit of some person other than the principal, does the act, knowing that the fact does not exist.

In cases of the latter character the liability of the principal for the agent's fraud is, in many jurisdictions, maintained upon the ground of an equitable estoppel, for reasons which have already been somewhat discussed in considering the general subject of scope of authority.<sup>39</sup> Those reasons appear to apply equally well to cases of the former class, just as the reasons in *Lloyd v. Grace, Smith & Co.* appear to apply equally well to cases of the latter class. In fact, the two classes appear to be identical.<sup>40</sup> Where estoppel is treated as the basis of decision, the principal is estopped, not merely from denying the truth of the representation, but from denying the authority of the agent to make it. Where the act thus authorized is a contract, the effect of the estoppel is to preclude the principal from denying the truth of the representation, and consequently from escaping liability upon the contract. And, since the person dealing with the agent may rely upon the representation, the principal is equally estopped from denying the authority of the agent to make it, when sought to be charged for the agent's fraud in an action of tort.

Accordingly it has been held that where the officer of a corporation, authorized to issue certificates of stock, fraudulently and for his own benefit issues certificates in excess of the amount which the corporation has power to issue and by collusion with the transferee causes them to be sold to a bona fide purchaser for value, the corporation is estopped to deny the authority of the agent to make the representation that the stock was not issued in excess of its authorized amount. The purchaser cannot, indeed, by estoppel, acquire the rights of a stockholder, for the stock, being issued in excess of the charter powers, is void; but he may recover damages against the principal for the agent's fraud in an action of tort.<sup>41</sup> It is only a bona fide purchaser without

<sup>38</sup> As in the cases just cited.

<sup>39</sup> Ante, p. 62.

<sup>40</sup> Ante, p. 65.

<sup>41</sup> *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30.

*Fifth Avenue Bank of New York v. Forty-Second St. & G. St. Ferry R. Co.*, 137 N. Y. 231, 33 N. E. 378, 19 L. R. A. 331, 33 Am. St. Rep. 712. See, also, *Allen v. South Boston R. Co.*, 150 Mass. 200, 22 N. E. 917, 5 L. R. A. 716, 15 Am. St. Rep. 185; *Tome v. Parkersburg Branch R. Co.*, 39 Md. 36, 17 Am. Rep. 540; *Western Maryland R. Co. v. Franklin Bank of Baltimore*, 60 Md. 36; *Manhattan Beach Co. v. Harned (C. C.)* 27 Fed. 484; *Appeal of Kisterbock*, 127 Pa. 601, 18 Atl. 381, 14 Am. St. Rep. 868. See *Clark, Corp.* (3rd Ed.) 444, 553.



notice who can assert the estoppel;<sup>42</sup> and the agent must be acting within an apparent authority to issue certificates.<sup>43</sup>

This principle has also been applied, in effect, to the case of a local agent of a telegraph company, who was also the local agent of an express company at the same place, and who, by sending a forged dispatch to a merchant requesting him to forward money to his correspondent at the former place, caused the money to be sent by express, and intercepted and converted the money. It was held that the telegraph company was liable, it being the business of the agent to send dispatches of a similar character, and the plaintiff being unable to know the circumstances that made the particular act wrongful and unauthorized.<sup>44</sup>

The application of the principle to bills of lading fraudulently issued by a shipping agent without receipt of the goods has already been considered. Such cases have usually arisen upon the attempt of the innocent consignee or indorsee for value to hold the principal liable upon the contract, and not in tort for the agent's fraud, but if the action is maintainable in the one form it would seem to be maintainable in the other. The conflicting decisions have been cited elsewhere.<sup>45</sup> In the Supreme Court of the United States it has been held that the action is maintainable neither in contract nor on the ground of tort, although it is admitted that a different rule applies to negotiable instruments.<sup>46</sup>

<sup>42</sup> *Moore v. Citizens' Nat. Bank*, 111 U. S. 156, 4 Sup. Ct. 345, 28 L. Ed. 385; *Farrington v. South Boston R. Co.*, 150 Mass. 406, 23 N. E. 109, 5 L. R. A. 849, 15 Am. St. Rep. 222; *Bank of New York National Banking Ass'n v. American Dock & Trust Co.*, 143 N. Y. 559, 38 N. E. 713.

<sup>43</sup> *Knox v. Eden Musee American Co.*, 148 N. Y. 441, 42 N. E. 988, 31 L. R. A. 779, 51 Am. St. Rep. 700. See, also, *Manhattan Life Ins. Co. v. Forty-Second & G. St. Ferry R. Co.*, 139 N. Y. 146, 34 N. E. 776; *Hill v. C. F. Jewett Pub. Co.*, 154 Mass. 172, 28 N. E. 142, 13 L. R. A. 193, 26 Am. St. Rep. 230.

<sup>44</sup> *McCord v. Western Union Tel. Co.*, 39 Minn. 181, 39 N. W. 315, 1 L. R. A. 143, 12 Am. St. Rep. 636. See, also, *Bank of Palo Alto v. Pacific Tel. Cable Co. (C. C.)* 103 Fed. 841.

<sup>45</sup> *Ante*, p. 63.

<sup>46</sup> *Friedlander v. Texas & P. Ry. Co.*, 130 U. S. 416, 9 Sup. Ct. 570, 32 L. Ed. 991. Fuller, C. J., said: "The fraud was in respect to a matter within the scope of Easton's employment or outside of it. It was not within it, for bills of lading could only be issued for merchandise delivered; and, being without it, the company, which derived no benefit from the unauthorized and fraudulent act, cannot be made responsible."

The opposite rule is applied by the Uniform Bills of Lading Act, § 23.

So as to negotiable bonds issued by the chief officers of a corporation. *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 19 Sup. Ct. 817, 43 L. Ed. 1081. *Negotiable instruments. Merchants' Nat. Bank v. State Bank* 10 Wall. 604, 19 L. Ed. 1008; note 12, p. 65.

*Same—Action for Deceit—Knowledge of Principal*

Since it is an essential element of deceit that the person making the representation have knowledge of its falsity or else make it in reckless disregard whether it be true or false, the difficulty of holding a personally innocent principal has presented itself. As we have seen, it is now generally held that an innocent principal is liable if the agent, while engaged in a transaction which as against the person injured is within the scope of his authority, makes the representation fraudulently.<sup>47</sup> The principal difficulty which remains lies in charging an innocent principal where the agent without authority, but innocently, represents a fact to be true which the principal knows is false. This question was considered in the famous case of *Cornfoot v. Fowke*,<sup>48</sup> where an agent employed to let a house, on being asked by an intending lessee whether there was any objection to it, said there was not, whereas, unknown to the agent, but known to the principal, the adjoining house was a brothel, and on the faith of the representation an agreement for a lease was entered into. In an action upon the agreement by the lessor for nonperformance, the lessee pleaded fraud. It was held that the plea was bad, although it would have been good if the principal had authorized the representation, or had purposely employed an ignorant agent, intending that the question, if asked, should be answered in the negative. Alderson, B., said: "I think it impossible to sustain a charge of fraud, when neither principal nor agent has committed any." Some dicta adverse to this decision are to be found.<sup>49</sup>

<sup>47</sup> Contra (holding that an action for deceit will not lie against an innocent principal): *Kennedy v. McKay*, 43 N. J. Law, 288, 39 Am. Rep. 581; *State (Decker, Prosecutor) v. Fredericks*, 47 N. J. Law, 469, 1 Atl. 470; *Freyer v. McCord*, 165 Pa. 539, 30 Atl. 1024; *Keefe v. Sholl*, 181 Pa. 90, 37 Atl. 116.

These New Jersey cases appear to be disapproved in *Corona Kid Co. v. Lichtman*, 84 N. J. Law, 363, 86 Atl. 371; and in *Mick v. Corporation of Royal Exch. Assur. of London, Eng.*, 87 N. J. Law, 607, 91 Atl. 102, 52 L. R. A. (N. S.) 1074, it is said that they apply at most only to the form of the remedy.

<sup>48</sup> 6 M. & W. 358.

<sup>49</sup> See *Fuller v. Wilson*, 3 Q. B. 68, 1009; *Feret v. Hill*, 15 C. B. 207; *National Exchange Co. v. Drew*, 2 Macq. 103; *Ludgater v. Love*, 44 L. T. (N. S.) 694; *Fitzsimmons v. Joslin*, 21 Vt. 129, 52 Am. Dec. 46; *Mayer v. Dean*, 115 N. Y. 556, 22 N. E. 261, 5 L. R. A. 540.

See per Lord Halsbury in *S. Pierson & Son v. Dublin Corporation*, [1907] App. Cas. 351, 357; *Pollock, Torts* (8th Ed.) p. 303. But see *Derry v. Peek*, 14 App. Cas. 337.

## ADMISSIONS BY AGENT—WHEN COMPETENT

## 16. The admission of an agent within the scope of his authority is an admission of the principal.

An admission, in the law of evidence, is a material declaration made by a party and offered in evidence against him.<sup>50</sup> The most obvious principles of justice require that a party's own statements should be evidence against himself,<sup>51</sup> although the statements of others are generally excluded as hearsay; and consequently the admission of his agent, if made under such circumstances that he must be deemed to be speaking through the lips of his agent, is also admissible against him.<sup>52</sup>

In order that the statement of an agent may be evidence against the principal as an admission, the relation of principal and agent must first be proved. It is not enough, however, to show that the relation existed when the statement was made. It must appear that the agent was acting, or purporting to act, as such in making the statement. Of course, if it could be shown that the speaker had authority to make that particular statement, the proof would be sufficient. In other cases it must appear that the statement was made by the agent within the scope of his authority, as that phrase has already been explained.<sup>53</sup>

It is commonly said that the statement must be made while the agent is engaged in transacting some authorized business and must be so connected with it as to constitute part of the *res gestæ*.<sup>54</sup> But "the Latin phrase adds nothing"; it is used here as an equivalent expression for the business on hand, or the pending transaction, as regards which for certain purposes the law identifies the principal and the agent.<sup>55</sup>

In an action against a railway company for the loss of a trunk, the declaration of the company's station master, made the next morning after the loss in accounting for the trunk to the plaintiff, was admis-

<sup>50</sup> Stephen's Dig. of Ev. art. 15.

<sup>51</sup> Stephen's Dig. of Ev. § 17; Wigmore, Ev. § 1078.

<sup>52</sup> Phipson, Ev. (5th Ed.) 214. See Wigmore, Ev. § 1048. Excepting receipts of agents, which are admissible by estoppel, there appears to be no reason for this rule except a false analogy to the substantive law. Some writers deny the rule. See *Virginia & T. R. Co. v. Sayers*, 67 Va. 328.

<sup>53</sup> *Kirkstall Brewery v. Furness Ry.*, L. R. 9 Q. B. 468.

<sup>54</sup> *United States v. Gooding*, 12 Wheat. (U. S.) 460, 6 L. Ed. 693; *Northwestern Union Packet Co. v. Clough*, 20 Wall. (U. S.) 528, 22 L. Ed. 406; *White v. Miller*, 71 N. Y. 134, 27 Am. Rep. 13; *State Bank of Brocton v. Brocton Fruit Juice Co.*, 208 N. Y. 492, 102 N. E. 591.

<sup>55</sup> See 15 Am. Law Rev. 80.

Thayer, *Cas. on Ev.* 630; McKelvey, *Ev.* 280; Mecham, *Ag.* (2d Ed.) p. 1360.

sible; it being part of his duty to deliver the baggage of passengers and to account for the same, provided inquiries were made within a reasonable time.<sup>56</sup> He was speaking for the principal within the scope of his authority. On the other hand, where the plaintiff was injured by a fall from the gangway while attempting to go on board the defendant's steamboat, and afterwards during the voyage the captain admitted to her that it was through the carelessness of the hands in putting out the plank that she fell, it was held error to permit the admission to be received.<sup>57</sup> This case is distinguishable from the preceding upon the ground that it was not part of the duty of the captain to render an account of the affair to the plaintiff in answer to her inquiries.

*Admission Incompetent to Prove Agency*

It follows from what has been said that neither the existence of the agency nor its extent can be proved by the admission of the agent.<sup>58</sup> His power to make admissions rests upon the very fact that he is agent and has authority to make the statement which constitutes the admission. To receive his statement as an admission of that authority would be to proceed in a circle. He is, however, competent as witness to testify to the fact and terms of his appointment.<sup>59</sup>

<sup>56</sup> *Morse v. Connecticut River R. Co.*, 6 Gray (Mass.) 450. See, also, *Lane v. Boston & A. R. Co.*, 112 Mass. 455; *Burnside v. Grand Trunk Ry. Co.*, 47 N. H. 554, 93 Am. Dec. 474.

<sup>57</sup> *Northwestern Union Packet Co. v. Clough*, 20 Wall. (U. S.) 528, 22 L. Ed. 406.

<sup>58</sup> *Brigham v. Peters*, 1 Gray (Mass.) 139; *Mussey v. Beecher*, 3 Cush. (Mass.) 511; *Hatch v. Squires*, 11 Mich. 185; *Sencerbox v. McGrade*, 6 Minn. 484 (Gil. 334); *Sax v. Davis*, 71 Iowa, 406, 32 N. W. 403; *Howe Mach. Co. v. Clark*, 15 Kan. 492; *Bohanan v. Boston & M. R. R.*, 70 N. H. 526, 49 Atl. 103; *Clark v. Salinger* (Sup.) 153 N. Y. Supp. 219.

Admissions of an agent are not evidence without proof of agency, but the former may be admitted before proof of the latter. *First Unitarian Soc. v. Faulkner*, 91 U. S. 415, 23 L. Ed. 283.

<sup>59</sup> *Gould v. Norfolk Lead Co.*, 9 Cush. (Mass.) 338, 57 Am. Dec. 50; *Thayer v. Meeker*, 86 Ill. 470; *Howe Mach. Co. v. Clark*, 15 Kan. 492; *Roberts v. Northwestern Nat. Ins. Co.*, 90 Wis. 210, 62 N. W. 1049 (though agent is husband of principal).

## NOTICE THROUGH AN AGENT—IMPUTED KNOWLEDGE

17. Notice to, or knowledge of, an agent while acting within the scope of his authority and in reference to a matter over which his authority extends, is notice to, or knowledge of, the principal.<sup>60</sup>

*In General*

In business dealings the rights and obligations of one person may be affected by the knowledge or notice which he may have of the adverse rights or equities of persons other than the one with whom he deals, or of other facts which, because known to him, give a different character to his act. And, if he deals through an agent, his rights and obligations are, as a rule, equally affected by knowledge or notice of any such matter which comes to the agent in the course of the business in which he is employed.<sup>61</sup> Where, for example, an agent authorized to receive money acquired knowledge in the same transaction that the money was being taken from a trust fund, his principal is not a holder in good faith;<sup>62</sup> and where an agent commits a fraud within the scope of his authority, his guilty knowledge is imputed to his principal.<sup>63</sup> It is commonly said that the general rule that a principal is bound by the knowledge of his agent is based on the principle that it is the agent's duty to communicate the knowledge which he has respecting the subject-matter of the agency, and the presumption that he will do his duty;<sup>64</sup> but this reason, like many others assigned for the identification of principal and agent, is somewhat artificial.<sup>65</sup> The true test, here as elsewhere in the law of agency, would seem to be whether the agent, in receiving the notice or entertaining the knowledge, represents the principal, in accordance with those considerations which determine the scope of an agent's authority.<sup>66</sup> He must be, or

<sup>60</sup> Mechem, Ag. (2d Ed.) § 1803.

<sup>61</sup> *Le Neve v. Le Neve*, 1 Ves. Sr. 64; *Sheldon v. Cox*, Ambl. 624; *Hiern v. Mill*, 13 Ves. 120; *The Distilled Spirits*, 11 Wall. (U. S.) 356, 20 L. Ed. 167; *Suit v. Woodhall*, 113 Mass. 391; *Macomb v. Wilkinson*, 83 Mich. 486, 47 N. W. 336; *In re Payne & Co.*, [1904] 2 Ch. 608; *Armstrong v. Ashley*, 204 U. S. 272, 27 Sup. Ct. 270, 51 L. Ed. 482; *Clement v. Young-McShea Amusement Co.*, 70 N. J. Eq. 677, 67 Atl. 82, 118 Am. St. Rep. 747; *Butler v. Michigan Mut. Life Ins. Co.*, 184 N. Y. 337, 77 N. E. 398.

<sup>62</sup> *Chapman v. Hughes*, 134 Cal. 641, 58 Pac. 298, 60 Pac. 974, 66 Pac. 982.

<sup>63</sup> See section 15, ante.

<sup>64</sup> *The Distilled Spirits*, 11 Wall. (U. S.) 356, 20 L. Ed. 167; *Henry v. Allen*, 151 N. Y. 1, 45 N. E. 355, 36 L. R. A. 658.

<sup>65</sup> Post, p. 82.

<sup>66</sup> "Where the employment of the agent is such that in respect to the particular matter in question he really does represent the principal, the formula

purport to be, an agent to receive notice, or an agent to act with reference to the knowledge which it is sought to impute. The agent's notice or knowledge is imputed to the principal merely as a means to charge the principal with a loss under the doctrine of respondeat superior; and the real question always is whether the loss is within the risk which the principal assumed.<sup>67</sup>

### *Agent to Receive Notice*

Where the question presented is merely whether a third person has performed his duty of giving notice to the principal, the giving of notice in good faith<sup>68</sup> to an agent within the scope of his authority is exactly equivalent to the giving of notice to the principal;<sup>69</sup> as where a retiring partner gives notice to the agent of a creditor of the firm in order to protect himself against future charges by the creditor.<sup>70</sup> The retiring partner having performed his duty, it is immaterial whether the creditor has knowledge or whether the agent suppressed the notice<sup>71</sup> or forgot it.<sup>72</sup> Whether the creditor, in subsequently giving credit to the firm and charging it to the retiring partner, had knowledge, is a different question, which can only arise when no notice has been given. In other words, the giving of notice to an agent and the imputation of an agent's knowledge to his principal are often distinct matters, to be resolved upon different considerations.<sup>73</sup>

In the former case, the receipt of notice binds the principal, in favor of the person giving it only, just as he would be bound by the receipt of money,<sup>74</sup> and for the same reason; i. e., because, as between him-

that the knowledge of the agent is his knowledge is correct." Per Lord Halsbury in *Blackburn v. Vigors*, 12 App. Cas. 531, 537.

<sup>67</sup> Ante, p. 67.

<sup>68</sup> Of course, if one giving notice knows, or ought to know, that the agent is defrauding his principal, he cannot claim the benefit of the notice. *Ayers v. Green Gold Min. Co.*, 116 Cal. 333, 48 Pac. 221; *Brown v. Harris*, 139 Mich. 372, 102 N. W. 960; *Shroul v. Standard Plate Glass Co.*, 201 Pa. 103, 50 Atl. 1003.

<sup>69</sup> *First Nat. Bank v. Fourth Nat. Bank*, 56 Fed. 967, 6 C. C. A. 183; *Buckeye Saw Mfg. Co. v. Rutherford*, 65 W. Va. 395, 64 S. E. 444; *Dickerson v. Matheson*, 57 Fed. 524, 6 C. C. A. 466.

<sup>70</sup> See *Cox v. Pearce*, infra; also *Austin v. Holland*, 69 N. Y. 571, 25 Am. Rep. 246; *Kenney v. Altwater*, 77 Pa. 34.

<sup>71</sup> A bank is charged with notice of letters received by the general bookkeeper, whose duty it is to open and distribute mail matter, although he conceals such letters to hide certain irregularities of his own. *First Nat. Bank v. Fourth Nat. Bank*, 56 Fed. 967, 6 C. C. A. 183.

<sup>72</sup> *Cox v. Pearce*, 112 N. Y. 637, 20 N. E. 566, 3 L. R. A. 563.

<sup>73</sup> The distinction is well set forth in an article by W. A. Seavey in 65 Un. of P. L. R. 1.

<sup>74</sup> See, also, *Armstrong v. Ashley*, 204 U. S. 272, 27 Sup. Ct. 270, 51 L. Ed. 482, last point decided, which is the real ground of decision.

self and the person dealing in good faith with the agent, he assumes the risk as to all acts which purport to be within the scope of authority.<sup>75</sup> And manifestly in such a case the principal might, under certain circumstances, be estopped to deny that the person to whom the notice was given was his agent.<sup>76</sup>

*Knowledge Acquired in Different Transaction*

Whether the doctrine of imputed notice may be extended to knowledge acquired by the agent in a previous or different transaction is a question upon which there is a conflict of authority.

By the earlier view, which formerly prevailed in England<sup>77</sup> and which still prevails in some jurisdictions in this country,<sup>78</sup> it was held that the rule could not be extended so far as to affect the principal by knowledge acquired by the agent in another transaction and at another time. In England the view seems now to be established that knowledge of an agent acquired previous to the agency, but actually present in his mind during the agency and while acting for his principal, and material to the business delegated, will, as respects such transaction or matter, be deemed notice to the principal.<sup>79</sup> This view has been approved by the Supreme Court of the United States,<sup>80</sup> and is the view more generally prevailing.<sup>81</sup>

The earlier view, it is submitted, rests chiefly, if not entirely, upon dicta.<sup>82</sup> Certain it is that, even in states which profess to follow it,

<sup>75</sup> See p. 67, ante.

<sup>76</sup> *Phenix Ins. Co. v. Hart*, 149 Ill. 513, 36 N. E. 990; *Springfield Engine & Thresher Co. v. Kennedy*, 7 Ind. App. 502, 34 N. E. 856.

<sup>77</sup> *Warrick v. Warrick*, 3 Atk. 291; *Worsley v. Earl of Scarborough*, 3 Atk. 392. See *Fuller v. Bennett*, 2 Hare, 294.

<sup>78</sup> *Houseman v. Association*, 81 Pa. 256; *Barbour v. Wiehle*, 116 Pa. 308, 9 Atl. 520; *McCormick v. Joseph*, 83 Ala. 401, 3 South. 796; *Texas Loan Agency v. Taylor*, 88 Tex. 47, 29 S. W. 1057; *Bangor, etc., Ry. Co. v. Am. Slate Co.*, 203 Pa. 6, 52 Atl. 40; *Mach. Co. v. Haley, etc., Co.*, 174 Ala. 190, 56 South. 726; *Sooy v. State*, 41 N. J. Law, 394. And see *Hanford v. Duchastel*, 87 N. J. Law, 205, 93 Atl. 586.

<sup>79</sup> *Dresser v. Norwood*, 17 C. B. (N. S.) 466.

<sup>80</sup> *The Distilled Spirits Case*, 11 Wall. (U. S.) 356, 20 L. Ed. 167.

<sup>81</sup> *Fairfield Sav. Bank v. Chase*, 72 Me. 226, 39 Am. Rep. 319; *Constant v. University*, 111 N. Y. 604, 19 N. E. 631, 2 L. R. A. 734, 7 Am. St. Rep. 769; *Snyder v. Partridge*, 138 Ill. 173, 29 N. E. 851, 32 Am. St. Rep. 130; *Union Bank v. Campbell*, 4 Humph. (Tenn.) 398; *Lebanon Sav. Bank v. Hollenbeck*, 29 Minn. 322, 13 N. W. 145; *Wilson v. Association*, 36 Minn. 112, 30 N. W. 401, 1 Am. St. Rep. 659; *Shafer v. Insurance Co.*, 53 Wis. 361, 10 N. W. 381; *Chouteau v. Allen*, 70 Mo. 290; *Pennoyer v. Willis*, 26 Or. 1, 36 Pac. 568, 46 Am. St. Rep. 594; *Westerman v. Evans*, 1 Kan. App. 1, 41 Pac. 675; *Chicago, St. P., M. & O. R. Co. v. Belliwith*, 28 C. C. A. 358, 83 Fed. 437; *Schwind v. Boyce*, 94 Md. 510, 51 Atl. 45; *New York Assets, etc., Co. v. Pforzheimer*, 158 App. Div. 700, 143 N. Y. Supp. 898.

<sup>82</sup> No case has been found in which the actual decision necessarily involves that view.

there are actual decisions to the contrary. Where, for instance, an agent takes securities for his principal, it is universally held that his knowledge of prior equities, though acquired in an independent transaction, will be imputed to his principal.<sup>83</sup> It must, of course, be established by the person asserting notice that the knowledge was present in the agent's mind,<sup>84</sup> although the burden would doubtless be sustained in any case if the information had been acquired so recently as to make it incredible that he should have forgotten it.<sup>85</sup>

*Knowledge Which is Confidential*

An exception to this rule is often asserted. Notice, it is said, will not be imputed to the principal if the fact of which the agent has knowledge was acquired by the agent confidentially as agent for another principal, under such circumstances that it would be a betrayal of professional confidence and a breach of his duty to the other principal to disclose it.<sup>86</sup>

This limitation upon the general rule, like the previous one, rests wholly in dicta; and its existence may be doubted. It is true that an attorney may not reveal to his principal a confidential communication from a former client; but, if the attorney acts for his now principal upon his confidential knowledge, so as to injure another person, there appears to be no reason why the principal should not be charged with his wrongful act, together with the knowledge which is an essential element of the act.<sup>87</sup>

<sup>83</sup> *Fire Ass'n v. L. G. & L. C. Co.*, 50 Tex. Civ. App. 172, 109 S. W. 1134; *Willard v. Denise*, 50 N. J. Eq. 483, 26 Atl. 29, 35 Am. St. Rep. 788. In both these states the opposite rule is announced. In a later New Jersey case the above case is said to be overruled and the opposite rule re-established. Yet the later case really accords with the earlier case and itself violates the rule which it professes to re-establish. *Vulcan Detinning Co. v. Am. Can Co.*, 72 N. J. Eq. 387, 67 Atl. 339, 12 L. R. A. (N. S.) 102.

And see *In re Heckman's Estate*, 172 Pa. 185, 33 Atl. 552.

<sup>84</sup> *Constant v. University*, 111 N. Y. 604, 19 N. E. 631, 2 L. R. A. 734, 7 Am. St. Rep. 769; *Burton v. Perry*, 146 Ill. 71, 34 N. E. 60; *Yerger v. Barz*, 56 Iowa, 77, 8 N. W. 769; *Equitable Securities Co. v. Sheppard*, 78 Miss. 217, 28 South. 217; *Gregg v. Baldwin*, 9 N. D. 515, 84 N. W. 373; *McCutcheon v. Dittman*, 164 N. Y. 355, 58 N. E. 97.

<sup>85</sup> *The Distilled Spirits Case*, 11 Wall. (U. S.) 356, 20 L. Ed. 167; *Chouteau v. Allen*, 70 Mo. 290; *Brothers v. Bank*, 84 Wis. 381, 54 N. W. 786, 36 Am. St. Rep. 932; *Foote v. Bank*, 17 Utah, 283, 54 Pac. 104.

<sup>86</sup> *The Distilled Spirits Case*, 11 Wall. (U. S.) 356, 20 L. Ed. 167; *Constant v. University*, 111 N. Y. 604, 19 N. E. 631, 2 L. R. A. 734, 7 Am. St. Rep. 769; *Fidelity Trust Co. v. Baker*, 60 N. J. Eq. 170, 47 Atl. 6. See *Mechem, Ag.* (2d Ed.) § 1814, for full citation of cases.

<sup>87</sup> So held by the court below in the only case found in which the knowledge was really confidential. The higher court expressed the contrary opinion, but the case went off on another point. *Akers v. Rowan*, 33 S. C. 451, 12 S. E. 165, 10 L. R. A. 705.



*Notice Must be of Matter within Scope of Agency*

The danger of extending the rule of imputed notice has always been recognized. The rule applies only to knowledge of facts which are material in the business for which the agent is employed. To affect the principal with notice, the matter known to the agent must be something within the scope of his agency; that is, in reference to which he has authority to act or to represent his principal toward third persons.<sup>88</sup>

*General Exception—Disclosure against Interest*

The principal, so the law is commonly stated, is not bound by the knowledge of his agent when it would be against the agent's interest to inform him of the facts. Therefore, if the agent is engaged in perpetrating an independent fraud on his own account, knowledge of facts relating to the fraud will not be imputed to the principal.<sup>89</sup>

<sup>88</sup> Wylie v. Pollen, 32 L. J. Ch. 782; Tate v. Hyslop, 15 Q. B. D. 368; Trentor v. Pothén, 46 Minn. 298, 49 N. W. 129, 24 Am. St. Rep. 225; Strauch v. May, 80 Minn. 343, 83 N. W. 156; Hickman v. Green, 123 Mo. 165, 22 S. W. 455, 27 S. W. 440, 29 L. R. A. 39; Pennoyer v. Willis, 26 Or. 1, 36 Pac. 568, 46 Am. St. Rep. 594; American Surety Co. v. Pauly, 170 U. S. 133, 18 Sup. Ct. 553, 42 L. Ed. 977; Bohanan v. Railroad Co., 70 N. H. 526, 49 Atl. 103; Foote v. Cutting, 195 Mass. 55, 80 N. E. 600, 15 L. R. A. (N. S.) 693; Fidelity Trust Co. v. Baker, 60 N. J. Eq. 170, 47 Atl. 6; Comey v. Harris, 133 App. Div. 686, 118 N. Y. Supp. 244; Gunster v. Company, 181 Pa. 327, 37 Atl. 550, 59 Am. St. Rep. 650.

In Trentor v. Pothén, supra, it was held that when an attorney was employed to examine an abstract of title, and to give an opinion as to the sufficiency of the title, it was not within the scope of the agency to go beyond the record evidences of title, and that consequently the client was not charged with notice of an adverse claim not disclosed by the record, which had come to the knowledge of the attorney while engaged in another transaction for another client.

So the knowledge of a clerk that the payee of his employer's check is fictitious is not the knowledge of the employer, where the only duty of the clerk is to inform the employer to whom checks should be drawn. Shipman v. Bank of N. Y., 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821. Contra, where the duty of the clerk is to draw the check. Phillips v. Mercantile Nat. Bank, 140 N. Y. 556, 35 N. E. 982, 23 L. R. A. 584, 37 Am. St. Rep. 596.

<sup>89</sup> Cave v. Cave, 15 Ch. D. 639; American Surety Co. v. Pauly, 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977; Thompson-Houston Electric Co. v. Electric Co., 12 C. C. A. 643, 65 Fed. 341; Dillaway v. Butler, 135 Mass. 479; Innerarity v. Bank, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710; Allen v. Railroad Co., 150 Mass. 200, 22 N. E. 917, 5 L. R. A. 716, 15 Am. St. Rep. 185; National Life Ins. Co. v. Minch, 53 N. Y. 144; Henry v. Allen, 151 N. Y. 1, 45 N. E. 355, 36 L. R. A. 658; Hickman v. Green, 123 Mo. 165, 22 S. W. 455, 27 S. W. 440, 29 L. R. A. 39; Benton v. Manufacturing Co., 73 Minn. 498, 76 N. W. 265; Cole v. Getzinger, 96 Wis. 559, 71 N. W. 75.

Two grounds have been assigned for this exception: (1) That it flows naturally from the reason on which the main rule is based; i. e., that the agent is under a duty to inform his principal and the law presumes he will do his duty (which cannot be presumed, it is said, when the character and nature of the agent's knowledge make it intrinsically improbable that he will inform his principal).<sup>90</sup> (2) That, since the agent is committing a fraud which is not for his principal's benefit, he is not acting within the scope of his authority.<sup>91</sup>

The first reason is manifestly unsatisfactory. It is sufficient to point out that, as a rule, an agent is not under a duty to inform his principal of the facts within his knowledge material to the business of his agency. His duty is merely to use such knowledge for the benefit of his principal. Probably the only meaning of this oft-repeated statement is that the law conclusively presumes the knowledge of the agent to be the knowledge of the principal—a mere enunciation of the rule, not the reason.<sup>92</sup>

The second reason assigned for the exception has already been discussed, and the conclusion reached that the fraud of an agent, which is not for the principal's benefit, may nevertheless be within the scope of authority, provided it purports to be done in the course of the business entrusted to the agent.<sup>93</sup>

The statement of this exception, says Mr. Mechem, is ill-founded and too broad.<sup>94</sup> In many of the cases which announce it the agent was not acting within the scope of his authority.<sup>95</sup> But, where clearly he is an agent to receive notice,<sup>96</sup> or is performing an act which purports to be within his authority, it is generally held that his principal will be charged with his notice or knowledge, in favor of the person dealing with the agent, in spite of the fact that he was engaged in an independent fraud on his own account,<sup>97</sup> except, of course, in favor of a person who was privy to the fraud.<sup>98</sup>

<sup>90</sup> See foregoing cases, and particularly *The Distilled Spirits*, 11 Wall. 356, 20 L. Ed. 167, which is the leading case containing this dictum.

<sup>91</sup> See *Allen v. Railroad Co.*, 150 Mass. 200, 22 N. E. 917, 5 L. R. A. 716, 15 Am. St. Rep. 185.

<sup>92</sup> See *Mechem, Ag.* (2d Ed.) § 1806.

<sup>93</sup> See p. 70, ante.

<sup>94</sup> *Mechem, Ag.* (2d Ed.) § 1822.

<sup>95</sup> See *Phillips v. Mercantile Nat. Bank*, 140 N. Y. 556, 35 N. E. 982, 23 L. R. A. 584, 37 Am. St. Rep. 596; *Am. Surety Co. v. Pauly*, 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977.

<sup>96</sup> See p. 78, ante.

<sup>97</sup> See p. 70, ante.

<sup>98</sup> *National Life Ins. Co. v. Minch*, 53 N. Y. 144; *Benedict v. Arnoux*, 154 N. Y. 715, 49 N. E. 326; *Cowan v. Curran*, 216 Ill. 598, 75 N. E. 322; *Traders &c. Bank v. Black*, 108 Va. 59, 60 S. E. 743; *Hudson v. Randolph*, 66 Fed. 216, 13 C. C. A. 402; *Garritson v. Bray*, 277 Ill. 158, 115 N. E. 195.

Doubtless the exception, as stated, is intended to apply where the third party, affected by the agent's fraud, was not dealing with the agent, as where an agent receives for value, on behalf of his principal, money, securities, things, commercial paper, or obligations, intending, primarily for his own benefit (or for that of a person other than his principal), to cut off the equity therein of a person other than the one from whom he receives the property. Is the agent's knowledge of the equity imputed to his principal, so as to make the latter responsible to the owner of the equity? On this point there is much conflict of authority, often in the same jurisdiction.<sup>99</sup>

Various reasons are assigned on either side. Perhaps the most plausible on the one side is that the agent's wrong, being committed for an independent purpose, is not within the scope of his authority; and, on the other, that the agent's wrong, being incident to the receipt of property for his principal, is attributable to the principal along with such receipt.<sup>1</sup> The former reason appears to be correct, and, it is believed, accords with the weight of authority. Transferring property to cut off an equity is similar to a tort; and the liability of the principal therefor is similar to that of a master for the tort of his servant. It does not include wrongs committed for an independent purpose, except in favor of the person who deals with the agent; in which case the principal assumes the risk. The case under consideration is analogous to the assault of a servant committed for his own purpose in the prosecution of his master's business.<sup>2</sup> The agent, in transferring the property to his principal and cutting off the equity, acts for himself, not for his principal; and the principal's subsequent assent completes the transfer of title, but does not charge the principal with the independent wrong, where he has parted with value before actual notice of the wrong.

<sup>99</sup> Principal not responsible: *Bienenstok v. Ammidown*, 155 N. Y. 47, 49 N. E. 321; *Allen v. South Boston R. R.*, 150 Mass. 200, 22 N. E. 917, 5 L. R. A. 716, 15 Am. St. Rep. 185; *Bank v. Thompson*, 118 Fed. 798, 56 C. C. A. 554; *Camden Safe D. Co. v. Lord*, 67 N. J. Eq. 489, 58 Atl. 607; *Hanford v. Duchastel*, 87 N. J. Law, 205, 93 Atl. 586; *Pursley v. Stahley*, 122 Ga. 362, 50 S. E. 139.

Principal responsible: *Holden v. N. Y. & Erie Bank*, 72 N. Y. 286; *Atlantic Mills v. Indian Orchard Mills*, 147 Mass. 268, 17 N. E. 496, 9 Am. St. Rep. 698 (dictum); *First Nat. Bank v. Blake* (C. C.) 60 Fed. 78; *Morris v. Georgia &c. Co.*, 109 Ga. 12, 34 S. E. 378, 46 L. R. A. 506; *Bank v. New Milford*, 36 Conn. 93.

In most of the foregoing cases, the agent, for an independent purpose, pays away his principal's money in return for money or commercial paper which he knows equitably belong to a stranger.

For a full collation of cases, see *Mechem, Ag.* (2d Ed.) § 1815 et seq.

<sup>1</sup> See *Mechem, Ag.* (2d Ed.) § 1817.

<sup>2</sup> See p. 67, notes 20, 21.

*Notice to Subagent*

If an agent has authority to employ a subagent, it seems that the same principles must apply as to the notice to be imputed to the principal as in cases of agents appointed by him directly, and that notice to the subagent of any fact material to the business which he is authorized to transact is notice to the principal.<sup>3</sup> This rule is frequently applied in cases of subagents appointed by insurance agents.<sup>4</sup> Nor would it seem to be material, so long as the agent had authority to appoint the subagent, whether privity of contract existed between him and the principal.<sup>5</sup> If the principal is bound by his act, he should also be charged by his knowledge. It has been held, however, by the Supreme Court of the United States, that where a creditor placed an account in the hands of a collecting agency, with instructions to collect, and the agency sent the claim to an attorney at the place of residence of the debtor, who persuaded him to confess judgment, the attorney was the agent of the collecting agency and not of the creditor, and that his knowledge of the insolvency of the debtor, who was soon after adjudged a bankrupt, was not chargeable to the creditor, so as to render the judgment a preference.<sup>6</sup> The decision was placed upon the ground that the attorney was the agent of an intermediate, independent contractor. Three members of the court dissented, holding that the attorney was the creditor's agent.<sup>7</sup> This is perhaps the only case that has distinguished between an agent and an independent contractor. Attorneys, factors, and brokers maintain independent establishments and control their own employés; but they have not been regarded as independent contractors.

## PARTIES TO THE CONTRACT

18. When the agent contracts in the name of his principal, the agent is not a party to the contract.

When the agent contracts in his own name, within the scope of his authority, both the agent and his principal are parties, except in the case of instruments under seal and negotiable instruments.

<sup>3</sup> *Boyd v. Vanderkemp*, 1 Barb. Ch. 273.

<sup>4</sup> *Arff v. Insurance Co.*, 125 N. Y. 57, 25 N. E. 1073, 10 L. R. A. 609, 21 Am. St. Rep. 721; *Carpenter v. Insurance Co.*, 135 N. Y. 298, 31 N. E. 1015; *Union Cent. Life Ins. Co. v. Smith*, 105 Mich. 353, 63 N. W. 438.

<sup>5</sup> *Ante*, p. 37.

<sup>6</sup> *Hoover v. Wise*, 91 U. S. 308, 23 L. Ed. 392.

<sup>7</sup> See comments on this case in *Bates v. Mortgage Co.*, 37 S. C. 88, 16 S. E. 883, 21 L. R. A. 340.

Whenever the agent acting within the scope of the authority which, as against the other party, he must be deemed to have, contracts in the name of the principal, the principal, and he only, is bound. It may be, however, that the agent in the execution or attempted execution of his authority contracts in such manner as to bind himself.<sup>8</sup> In such case he is personally a party to the contract; and, if the contract was within the scope of his authority, the principal, although undisclosed, is a party also. "If an agent makes a contract in his own name, the principal may sue and be sued upon it; for it is a general rule that whenever an express contract is made an action is maintainable upon it, either in the name of the person with whom it was actually made, or in the name of the person with whom, in point of law, it was made."<sup>9</sup> The agent is a party because the contract is his personal act. The principal is a party by construction of law.

If the principal has received the benefit of the contract, as in the case of a contract of sale where the goods purchased by the agent have come to the use of the principal, it is not strange that the courts should have found some theory to hold him liable to pay for them in an action of contract; and it was in fact in cases of this nature that the doctrine of the liability of the principal had its inception. It is at a later date that we find the liability of the other party to the principal expressly recognized. The rule, whatever its origin, is an illustration of the identification of principal and agent<sup>10</sup> which runs through this branch of the law.

The question whether the agent is to be deemed to contract personally, or merely as agent, depends, as a rule, upon the intention of the parties as disclosed by the terms of the contract and the surrounding circumstances.<sup>11</sup> If the contract is in writing the construction is for the court, and if not reduced to writing the intention of the parties is for the jury. If the principal is undisclosed, of course, the agent

<sup>8</sup> "Although an agent is duly authorized," said Shaw, C. J., "if by the terms of his contract he binds himself personally, and engages expressly in his own name to pay or perform other obligations, he is responsible, though he describes himself as agent." *Simonds v. Heard*, 23 Pick. (Mass.) 120, 34 Am. Dec. 41.

See *Jones v. Gould*, 200 N. Y. 18, 92 N. E. 1071; *Sadler v. Young*, 78 N. J. Law, 594, 75 Atl. 890.

<sup>9</sup> *Cothay v. Fennell*, 10 B. & C. 671.

<sup>10</sup> 5 Harvard Law Rev. 1-6.

<sup>11</sup> The agent may also use such words as to bind both the principal and himself, as where he contracts for the principal and assumes the obligation of a surety. *Young v. Schuler*, 11 Q. B. D. 651. Or gives his own warranty along with that of the principal. *Dahlstrom v. Gemunder*, 198 N. Y. 449, 92 N. E. 106.

must be deemed to contract personally;<sup>12</sup> and the rule is the same when the name of the principal, but not the fact of the agency, is undisclosed,<sup>13</sup> although it is, of course, possible for the agent to exonerate himself by the terms of the contract.<sup>14</sup> And it will be assumed, in the absence of words strongly and distinctly expressive of agency, that one who deals with an agent for an unnamed principal intended to take the alternative liability of the principal or the agent.<sup>15</sup>

### *Same—Parol Evidence*

The construction of a written instrument is for the court.<sup>16</sup> Where it clearly appears from the contract that the agent contracts personally, parol evidence is inadmissible to show that he contracted as agent, and that it was not the intention of the parties that he should be personally bound, for such evidence would contradict the written contract.<sup>17</sup> In case of ambiguity, parol evidence may be admitted.<sup>18</sup> It seems that although the instrument contains words describing the agent as such, if upon ordinary principles of construction the words are to be taken as mere descriptio personæ, and there is no further indication of intention to bind the principal, parol evidence is not admis-

<sup>12</sup> *Kayton v. Barnett*, 116 N. Y. 625, 23 N. E. 24; *Merrill v. Kenyon*, 48 Conn. 314, 40 Am. Rep. 174; *Appeal of National Shoe & Leather Bank*, 55 Conn. 469, 12 Atl. 646.

<sup>13</sup> *Thomson v. Davenport*, 9 B. & C. 78; *Jones v. Littledale*, 6 Ad. & E. 486; *Ye Seng Co. v. Corbitt* (D. C.) 9 Fed. 423; *Winsor v. Griggs*, 5 Cush. (Mass.) 210; *Cobb v. Knapp*, 71 N. Y. 348, 27 Am. Rep. 51; *Argersinger v. MacNaughton*, 114 N. Y. 539, 21 N. E. 1022, 11 Am. St. Rep. 687; *McClure v. Trust Co.*, 165 N. Y. 108, 58 N. E. 777, 53 L. R. A. 153; *De Remer v. Brown*, 165 N. Y. 410, 59 N. E. 129; *Brown v. Ames*, 59 Minn. 476, 61 N. W. 448.

<sup>14</sup> A broker sent a contract note: "Messrs. S.: I have this day sold by your order and for your account, to my principals. \* \* \* [Signed] W. A. B." Held, in an action of goods sold and delivered, that he was not personally liable. *Southwell v. Bowditch*, 1 C. P. D. 374. In such case, however, the agent may be liable also where there is usage to that effect.

<sup>15</sup> *Thompson v. Davenport*, 9 B. & C. 78; *Bell v. Teague*, 85 Ala. 211, 3 South. 861; *Wheeler v. Reed*, 36 Ill. 81; *Kean v. Davis*, 20 N. J. Law, 425; *Murphy v. Helmrich*, 66 Cal. 69, 4 Pac. 958.

<sup>16</sup> *Tanner v. Christian*, 4 El. & B. 591; *Southwell v. Bowditch*, 1 C. P. D. 374; *Hayes v. Crane*, 48 Minn. 39, 50 N. W. 925.

<sup>17</sup> *Jones v. Littledale*, 6 Ad. & E. 486; *Higgins v. Senior*, 8 M. & W. 834.

When an invoice is only evidence of a contract, and not the contract, parol evidence is admissible to show that a person whose name appears at the head as seller is not in fact a contracting party. *Holding v. Elliott*, 5 H. & N. 117.

<sup>18</sup> *McCollin v. Gilpin*, 6 Q. B. D. 516. See, also, *Ziegler v. Fallon*, 28 Mo. App. 295; *Becker v. Lamont*, 13 How. Prac. (N. Y.) 23; *State v. Commissioners*, 60 Neb. 566, 83 N. W. 733; *De Remer v. Brown*, 165 N. Y. 410, 59 N. E. 129.

sible to control the construction.<sup>19</sup> In some jurisdictions, however, it has been held that where such words as "agent," "trustee," and the like are affixed to the name of a party to the contract they are *prima facie* descriptive only, but that it may be shown by extrinsic evidence that they were intended and understood by the parties as determining the character in which he contracted.<sup>20</sup> And this rule is extended to negotiable instruments,<sup>21</sup> but not to instruments under seal.<sup>22</sup>

It might also be expected that the so-called parol evidence rule would render impossible a suit by or against a principal when the contract is in writing and purports to be made with or by the agent on his own behalf. The effect of such evidence appears to be to vary the terms of the written instrument, to which the principal does not purport to be a party, yet this view has not prevailed. "There is no doubt," said Parke, B., "that where such an agreement is made, it is competent to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principals: and this, whether the agreement be or be not required to be in writing by the statute of frauds; and this evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom, on the face of it, it purports to bind; but it shows that it also binds another, by reason that the act of the agent, in signing the agreement, in pursuance of his authority, is in law the act of the principal."<sup>23</sup>

Whatever the merits of the reasoning, the rule that parol evidence is admissible to show who was the real principal is firmly established, both in respect to agreements required by the statute of frauds<sup>24</sup> to be in writing and those which are not.<sup>25</sup> But, as intimated in the pas-

<sup>19</sup> *Jones v. Littledale*, 6 Ad. & E. 486; *Higgins v. Senior*, 8 M. & W. 834. See, also, *Pike v. Quigley*, 18 Q. B. D. 708; *Fleet v. Murton*, L. R. 7 Q. B. 126; *Walker v. Christian*, 21 Grat. (Va.) 291.

The agent may, however, prove as an equitable defense an express agreement that he was not to be liable, when by mistake the written contract fails to carry out such agreement. *Wake v. Harrop*, 1 H. & C. 202.

<sup>20</sup> *Pratt v. Beaupre*, 13 Minn. 187 (Gil. 177); *Deering v. Thom*, 29 Minn. 120, 12 N. W. 350; *Peterson v. Homan*, 44 Minn. 166, 46 N. W. 303, 20 Am. St. Rep. 564; *Rhone v. Powell*, 20 Colo. 41, 36 Pac. 899. Cf. *Rowell v. Oleson*, 32 Minn. 288, 20 N. W. 227; *American Bonding & Trust Co. v. Takahashi*, 49 C. C. A. 267, 111 Fed. 125.

<sup>21</sup> See p. 96, post.

<sup>22</sup> See p. 95, post.

<sup>23</sup> *Higgins v. Senior*, 8 M. & W. 834.

<sup>24</sup> *Bateman v. Phillips*, 15 East, 272; *Higgins v. Senior*, 8 M. & W. 834; *Trueman v. Loder*, 11 Ad. & E. 589; *Lerned v. Johns*, 9 Allen (Mass.) 419; *Kingsley v. Siebrecht*, 92 Me. 23, 42 Atl. 249, 69 Am. St. Rep. 486.

<sup>25</sup> *Ford v. Williams*, 21 How. 287, 16 L. Ed. 36; *Darrow v. Produce Co.* (C. C.) 57 Fed. 463; *Huntington v. Knox*, 7 Cush. (Mass.) 371, 374; *Byington v. Simp-*

sage quoted, the converse of the proposition does not hold true, and an agent so contracting cannot show by parol that it was not the intention of the parties to bind him personally, and so relieve himself from liability; for that, it is said, would be to allow parol evidence to contradict the written instrument.<sup>26</sup>

*Where Terms of Contract Exclude Principal*

Where the contract is made in the name of the agent, the principal becomes a party, not by reason of the terms of the contract, but by operation of law. Nevertheless it is generally stated that the principal may be excluded by the express or implied terms of the contract, either from the right to sue or from the liability to be sued, if the intention of the parties is clearly indicated to that effect.<sup>27</sup> Merely contracting with the agent as if he were principal is not enough, whether the principal be known or undisclosed;<sup>28</sup> nor is the other party precluded from suing an undisclosed principal, even though he had, before contracting with the agent, refused to do business with the principal.<sup>29</sup> It has even been held that the undisclosed principal may sue under such circumstances, although there are dicta to the contrary.<sup>30</sup> The intention to exclude the principal may be shown by the express terms of the agreement, or may be implied from the attendant circumstances. Thus, in the case of a chartered party, where the agent described himself as owner of the chartered vessel, it was held that the undisclosed principal and real owner was not entitled to show that

son, 134 Mass. 169, 45 Am. Rep. 314; *Coleman v. Bank*, 53 N. Y. 394; *Lindeke Land Co. v. Levy*, 76 Minn. 364, 79 N. W. 314; and cases cited in preceding note.

"Among the ingenious arguments \* \* \* there was one which it may be fit to notice; the supposition that parol evidence was introduced to vary the contract, showing it not to have been made by Higginbotham, whose name is inserted in it, but by the defendant, who gave him the authority. Parol evidence is always necessary to show that the party sued is the person making the contract and bound by it. Whether he does so in his own name or in that of another, or in a feigned name, and whether the contract is signed by his own hand or by that of an agent, are inquiries not different in their nature from the question, who is the person who has just ordered goods in a shop. If he is sued for the price, and his identity made out, the contract is not varied by appearing to have been made by him in a name not his own." Per Lord Denman, in *Trueman v. Loder*, 11 Ad. & E. 589.

<sup>26</sup> *Higgins v. Senior*, 8 M. & W. 834.

<sup>27</sup> *Humble v. Hunter*, 12 Q. B. 310; *Winchester v. Howard*, 97 Mass. 303, 93 Am. Dec. 93. See, also, *King v. Batterson*, 13 R. I. 117, 43 Am. Rep. 13; *Boston Ice Co. v. Potter*, 123 Mass. 28, 25 Am. Rep. 9.

<sup>28</sup> See same cases.

<sup>29</sup> *Kayton v. Barnett*, 116 N. Y. 625, 23 N. E. 24.

<sup>30</sup> *Kelly Asphalt Block Co. v. Barber Asphalt Paving Co.*, 211 N. Y. 68, 105 N. E. 88, L. R. A. 1915C, 256.



the agent contracted on his behalf so as to enable him to maintain an action upon the contract.<sup>31</sup> The principle is the same when the contract is oral, as where upon a contract of sale the person with whom the buyer deals represents himself to be owner, and denies that another person, with whom the buyer expresses unwillingness to deal, but who is in truth owner and principal, is such.<sup>32</sup>

Where the nature of the contract is such that the personality of the agent and ostensible principal is or may be of importance, as where his character, skill, or solvency is an essential element of the performance contemplated, it is, of course, clear that the law cannot confer upon the undisclosed principal the right to perform.<sup>33</sup> Yet, even in such case, if the contract is not by its terms made solely with the ostensible principal to the exclusion of any other principal, and if the facts surrounding the making of the contract are not such as to show an intention to deal with the ostensible principal exclusively, after the contract has been performed according to its terms, the undisclosed principal may maintain an action upon it to recover the price or otherwise to enforce performance of the other party's part of the contract.<sup>34</sup>

#### *Election between Principal and Agent*

It is the common statement of the law that, when principal and agent are thus liable on the contract, the other party has an election between them,<sup>35</sup> since the two obligations running to the same party upon the same consideration were not intended to be collateral, but alternative. A few cases, indeed, have held that both are liable until the claim is satisfied,<sup>36</sup> thus rejecting entirely the theory of election; but the weight of authority upholds that theory. However, nothing amounts to such an election short of conduct, with full knowledge, evidencing an unequivocal and final determination to depend solely upon the liability of one and to abandon the right to proceed against the other.<sup>37</sup>

<sup>31</sup> *Humble v. Hunter*, 12 Q. B. 310.

<sup>32</sup> *Winchester v. Howard*, 97 Mass. 303, 93 Am. Dec. 93. This case may be explained on the ground of fraud. See *Kelly, etc., Co. v. Barber, etc., Co.*, supra.

<sup>33</sup> *Kelly v. Thuey*, 102 Mo. 522, 15 S. W. 62. But see *Id.*, 143 Mo. 422, 45 S. W. 301; post, p. 91.

<sup>34</sup> *Grojan v. White*, 2 Stark. 443; *Sullivan v. Shailor*, 70 Conn. 733, 40 Atl. 1054; *Warder v. White*, 14 Ill. App. 50. See, also, *Wiehle v. Safford*, 27 Misc. Rep. 562, 58 N. Y. Supp. 298; *Kelly Asphalt Block Co. v. Barber Asphalt Paving Co.*, 211 N. Y. 68, 105 N. E. 88, L. R. A. 1915C, 256.

<sup>35</sup> See all the cases under this topic. See *Mechem, Ag.* (2d Ed.) § 1750.

<sup>36</sup> *Beymer v. Bonsall*, 79 Pa. 298. And see *quære* in *Georgi v. Texas Co.*, 173 App. Div. 809, 160 N. Y. Supp. 231, and cases cited. See *Mechem, Ag.* (2d Ed.) § 1759.

<sup>37</sup> 2 *Corpus Juris*, 844. See *Mechem, Ag.* (2d Ed.) § 1754.

Merely bringing suit is not sufficient,<sup>38</sup> but entering judgment is.<sup>39</sup> Manifestly there cannot be an election before the existence and identity of the principal are known. Even entering judgment against the agent without such knowledge is not conclusive.<sup>40</sup> The mere fact that the other party, with full knowledge as to the principal, enters into a contract in writing which purports to be the personal contract of the agent, is not an election;<sup>41</sup> otherwise, the doctrine of election would be confined to the case of an undisclosed principal, and such is not the rule,<sup>42</sup> though the contrary has been held.<sup>43</sup> As to whether taking the agent's note when the principal is known constitutes an election, the cases are not agreed.<sup>44</sup>

*When Professed Agent is Real Principal*

Inasmuch as the real principal, whether disclosed or undisclosed, is liable on a contract made on his behalf, it may be shown that a person who purports to contract as agent, either of an unnamed<sup>45</sup> or of a named principal,<sup>46</sup> was in fact acting on his own behalf, and is himself the real principal. Having misled the other party into contract-

<sup>38</sup> *Curtis v. Williamson*, L. R. 10 Q. B. 57; *Hoffman v. Anderson*, 112 Ky. 893, 67 S. W. 49; *Weil v. Raymond*, 142 Mass. 206, 213, 7 N. E. 860; *Cobb v. Knapp*, 71 N. Y. 348, 27 Am. Rep. 51.

<sup>39</sup> *Priestly v. Fernie*, 3 H. & C. 977; *Kingsley v. Davis*, 104 Mass. 178; *Tut-hill v. Wilson*, 90 N. Y. 423; *Codd v. Parker*, 97 Md. 319, 55 Atl. 623. See *Coles v. McKenna*, 80 N. J. Law, 48, 76 Atl. 344. But quære, *Georgi v. Texas Co.*, 173 App. Div. 809, 160 N. Y. Supp. 231.

<sup>40</sup> *Greenburg v. Palmieri*, 71 N. J. Law, 83, 58 Atl. 297; *Lindquist v. Dickson*, 98 Minn. 369, 107 N. W. 958, 6 L. R. A. (N. S.) 729, 8 Ann. Cas. 1024; *Brown v. Reiman*, 48 App. Div. 295, 62 N. Y. Supp. 663.

<sup>41</sup> *Calder v. Dobell*, L. R. 6 C. P. 486; *Byington v. Simpson*, 134 Mass. 169, 45 Am. Rep. 314. See *Moline Malleable Iron Co. v. Iron Co.*, 27 C. C. A. 442, 83 Fed. 66.

Unless it clearly appears that there was an election to give exclusive credit to the agent. *Paterson v. Gaudasequi*, 15 East, 62; *Hazelhurst v. Carlisle*, 130 Ky. 1, 112 S. W. 934; *Silver v. Jordan*, 136 Mass. 319; *Burns v. Royal Bank*, 128 N. Y. Supp. 723; *Davis v. Lynch*, 31 Misc. Rep. 724, 65 N. Y. Supp. 225.

<sup>42</sup> See foregoing cases.

<sup>43</sup> *Chandler v. Coe*, 54 N. H. 561; *Ferguson v. McBean*, 91 Cal. 63, 27 Pac. 518, 14 L. R. A. 65.

<sup>44</sup> Some cases hold such conduct an election on the theory that the note is taken as payment. *Schepflin v. Dessar*, 20 Mo. App. 569. So in Massachusetts, where accepting paper is always presumptive payment. *Perkins v. Cady*, 111 Mass. 318. Contra: *Atlas Co. v. Colombian Land Co.*, 102 Fed. 358, 42 C. C. A. 398; *Rathbone v. Tucker*, 15 Wend. (N. Y.) 498.

<sup>45</sup> *Carr v. Jackson*, 21 L. J. Ex. 137; *Adams v. Hall*, 37 L. T. 70. See, also, *Patrick v. Bowman*, 149 U. S. 411, 13 Sup. Ct. 811, 37 L. Ed. 790.

<sup>46</sup> *Railton v. Hodgson*, 15 East, 67; *Isham v. Burgett*, 157 Mass. 546, 32 N. E. 907. See, also, *Jenkins v. Hutchinson*, 13 Q. B. 744. Contra: *Heffron v. Pollard*, 73 Tex. 96, 11 S. W. 165, 15 Am. St. Rep. 764.

ing with him, he is precluded from setting up that he is excluded by the terms of the contract. But where one who professes to contract as agent of a named principal is in fact the real principal, it would seem that, the contract being expressly with another person, the person contracting as agent could not maintain an action in whatsoever character.<sup>47</sup> Where the character and credit of the person who is named as principal may reasonably be considered as a material ingredient in the contract, it is conceded that the professed agent cannot, at least when the other party has not recognized him as the real principal, show himself to be such and maintain an action,<sup>48</sup> unless part performance has been accepted with knowledge of the true principal.<sup>49</sup>

A distinction has been drawn between cases where the professed agent contracts as agent of a named and of an unnamed principal. In the latter case it has been held that since the other party cannot have contracted in reliance upon the unnamed principal personally the ostensible agent can sue upon the contract, although there has been no recognition of him by the other party as real principal.<sup>50</sup>

#### *Agent's Right to Sue Subservient*

When a contract is made by an agent in his own name, he is bound thereby and has a corresponding right to sue thereon. If he recovers, he will hold the sum recovered as trustee for the real owner.<sup>51</sup>

The agent's right of action, however, unless he has a special interest in the subject-matter, is subservient to the right of the principal, who may supersede the agent's right by suing in his own name or otherwise intervening;<sup>52</sup> and, even if the agent has commenced an action, the principal may still intervene, and thereafter the right of the agent to sue ceases.<sup>53</sup> If the agent has, as against his principal, a right of

<sup>47</sup> See *Hollman v. Pullin*, 1 Cab. & E. 254.

<sup>48</sup> *Rayner v. Grote*, 15 M. & W. 359; *Schmaltz v. Avery*, 16 Q. B. 655, per *Patterson, J.*

<sup>49</sup> *Rayner v. Grote*, 15 M. & W. 359; *Whiting v. William H. Crawford Co.*, 93 Md. 390, 49 Atl. 615.

<sup>50</sup> *Harper v. Vigers*, [1909] 2 K. B. 549; *Schmaltz v. Avery*, 16 Q. B. 655.

In that case *Schmaltz & Co.* signed a charter party as "agents of the freighter," a clause being inserted limiting their liability in view of the "charter being concluded on behalf of another party." It was held that *Schmaltz & Co.*, who were themselves the freighters, might sue upon the contract.

And the same is true where the named principal is a dummy, whose credit could not have been relied upon. *Lenman v. Jones*, 222 U. S. 51, 32 Sup. Ct. 18, 56 L. Ed. 89.

<sup>51</sup> *Joseph v. Knox*, 3 Camp. 320.

<sup>52</sup> *Sadler v. Leigh*, 4 Camp. 195; *Morris v. Cleasby*, 1 M. & S. 576, 579. See *Dickinson v. Naul*, 4 B. & Ad. 638.

<sup>53</sup> *Sadler v. Leigh*, 4 Camp. 195.

lien in the subject-matter, his right to sue on the contract has priority, during the existence of his claim, to that of the principal.<sup>54</sup>

### *Defenses in Action by Agent*

Since the right of the principal to sue is superior, the defendant may in a suit by the agent avail himself of any defense, in law or equity, which would have been good against the principal.<sup>55</sup> Thus, a settlement with the principal is a good defense.<sup>56</sup> Under the statute of set-offs it has been held that the defendant cannot set off a debt due from the principal;<sup>57</sup> but the contrary has also been held.<sup>58</sup> If, on the other hand, the agent by reason of a lien, as against the principal, upon the subject-matter, has a superior right to sue, a settlement with the principal is not a defense when such settlement would prejudice the agent's claim,<sup>59</sup> unless the defendant was led by the terms or conditions of the contract, or by the conduct of the agent, to believe that the agent acquiesced in a settlement with the principal.<sup>60</sup>

### *How far Principal Subject to Defenses against Agent*

It is obvious that if an undisclosed principal can enforce his rights upon a contract made by his agent, acting ostensibly as principal, without regard to the defenses which might be available to the other party, were the action brought by the person with whom he believed himself to be dealing as principal, grave injustice would result.

It may, therefore, be laid down as a general rule that in an action by the undisclosed principal the other party to the contract is entitled to all equities and defenses which existed in his favor against the agent at the time when the existence of the agency was first disclosed. The most frequent application of this rule has been in cases of sales by factors or other agents intrusted with the possession of the goods,

<sup>54</sup> *Drinkwater v. Goodwin*, Cowp. 251; *Bowstead*, Dig. Ag. art. 120. Cf. *Moline Malleable Iron Co. v. Iron Co.*, 27 C. C. A. 442, 83 Fed. 66.

If he has a lien on the goods as against the principal, the latter's right to sue on the contract is, while the claim of the agent is unsatisfied, subservient to that of the agent, and payment to or settlement with the agent is a discharge, notwithstanding notice not to pay or settle with the agent. *Hudson v. Granger*, 5 B. & Ald. 27. See *Bowstead*, Dig. Ag. art. 96.

<sup>55</sup> *Leo v. McCormack*, 186 N. Y. 330, 78 N. E. 1096; *Holden v. Rutland R. R.*, 73 Vt. 317, 50 Atl. 1096.

<sup>56</sup> *Atkinson v. Cotesworth*, 3 B. & C. 647.

<sup>57</sup> *Isberg v. Bowden*, 8 Ex. 852; *Alsop v. Caines*, 10 Johns. (N. Y.) 396.

<sup>58</sup> *Bliss v. Sneath*, 103 Cal. 43, 36 Pac. 1029; *Hayden v. Bank*, 29 Ill. App. 458.

The matter of set-off is generally dependent upon statute. See *Mechem, Ag.* (2d Ed.) § 2046.

<sup>59</sup> *Robinson v. Rutter*, 4 El. & B. 954.

<sup>60</sup> *Grice v. Kendrick*, L. R. 5 Q. B. 340.

where the buyer has been entitled to set off a debt due from the agent, when sued by the principal for the price.<sup>61</sup>

So long as the other party is ignorant of the rights of the real principal, he may safely deal with the agent as principal; but, after receiving notice of the principal's rights, any settlement with or payment to the agent is at his peril. Where the other party knows that he is dealing with an agent, although he does not know who the principal is, he is not protected.<sup>62</sup> It is said that the right of the buyer who has dealt with the factor or other agent as principal to set off a debt due from the agent rests upon estoppel, but it would seem rather to follow as a result of the identification of principal and agent which rests upon the doctrine of agency.<sup>63</sup> All that is necessary is that the agent, in representing himself as principal, act within the scope of authority, even though he violate express directions,<sup>64</sup> and that the other party reasonably believe that the agent is principal.<sup>65</sup>

<sup>61</sup> *Rabone v. Williams* (1785) 7 T. R. 360, note a; *George v. Clagett*, 7 T. R. 359; *Carr v. Hinchcliffe*, 7 D. & R. 42; *Ex parte Dixon*, 4 Ch. D. 133; *Hogan v. Shorb*, 24 Wend. (N. Y.) 458; *Pollacek v. Scholl*, 51 App. Div. 319, 64 N. Y. Supp. 979; *Frame v. Coal Co.*, 97 Pa. 309; *Gardner v. Allen*, 6 Ala. 187, 41 Am. Dec. 45. See, also, *Wiser v. Mining Co.*, 94 Ill. App. 471. See *Everdell v. Carrington*, 154 App. Div. 500, 139 N. Y. Supp. 119.

<sup>62</sup> *Fish v. Kempton*, 7 C. B. 687; *Semenza v. Brinsley*, 18 C. B. (N. S.) 467; *Dresser v. Norwood*, 17 C. B. (N. S.) 466 (buyer bound by knowledge on part of his broker that factor sold in behalf of principal); *Traub v. Milliken*, 57 Me. 67, 2 Am. Rep. 14; *Rosser v. Darden*, 82 Ga. 219, 7 S. E. 919, 14 Am. St. Rep. 152.

<sup>63</sup> *Cooke v. Eshelby*, 12 App. Cas. 271; *Baring v. Corrie*, 2 B. & Ald. 137; *Montague v. Forwood*, [1893] 2 Q. B. 351; *Baxter v. Sherman*, 73 Minn. 434, 76 N. W. 211, 72 Am. St. Rep. 631.

<sup>64</sup> *Ex parte Dixon*, 4 Ch. D. 133.

"Now, the rule of law is that the extent of an agent's authority, as between himself and third parties, is to be measured by the extent of his usual employment. That being so, the very fact of intrusting your goods to a man as factor, with a right to sell them, is *prima facie* authority to sell in his own name." *Per Brett, J. A.*

*Crosby v. Hill*, 39 Ohio St. 100. In that case plaintiffs' broker, who was not intrusted with possession, contracted in his own name to sell goods to defendant, who had no knowledge that the broker was not the real owner, but dealt with him as such. The broker notified plaintiffs that he had sold for them, and directed them where to ship to the buyer; and they, without knowledge that the broker had contracted in his own name, and without any conduct clothing him with authority to receive payment, or with possession, actual or constructive, delivered to defendant. Held, that payment by defendant to the broker, though before notice of plaintiffs' rights, was not a bar to plaintiffs' right to recover.

A buyer who had bought goods from one not in possession, with whom he dealt as owner, and who was indebted to him on an account in part settle-

<sup>65</sup> *Cooke v. Eshelby*, 12 App. Cas. 271.

*Settlement with Agent by Undisclosed Principal*

While the other party to the contract may, as a rule, upon discovering the existence of a principal, resort to him for performance of the contract, it is obvious that the strict application of the rule will result in hardship, if not injustice, to the principal if he has in the meantime settled with the agent and is compelled again to settle with the other party. The cases are in conflict as to whether settlement with the agent under such circumstances is a defense when the principal is subsequently called upon by the other party for performance, or whether it is a defense only provided the principal has made the settlement in the belief, induced by the words or conduct of the other party, that a settlement has already been made by the agent; in other words, whether or not the defense rests upon the ground of estoppel. The question usually arises where a contract of purchase has been made on behalf of an undisclosed principal, who when called upon by the seller for payment has already paid the agent for the goods.

The earlier English cases took the view that it would be unjust to compel the principal to pay again when he has settled with the agent in good faith while exclusive credit was still being given to the latter;<sup>66</sup> but, after much uncertainty,<sup>67</sup> it was finally decided by the Court of Appeal in *Irvine v. Watson*<sup>68</sup> that nothing less than estoppel would serve as a defense in such a case. The reasoning is, in short, that the principal, having originally authorized his agent to create a debt, cannot be discharged from it except by payment, unless the seller has es-

ment of which the goods were sold, could not, when informed before delivery that the goods were the property of an undisclosed principal, set off the amount due from the agent in an action by the principal for the value of the goods. *McLachlin v. Brett*, 105 N. Y. 391, 12 N. E. 17.

<sup>66</sup> *Thomas v. Davenport*, 9 B. & C. 78 (1829).

<sup>67</sup> See *Heald v. Kenworthy*, 10 Ex. 739 (1855), and *Armstrong v. Stokes*, L. R. 7 Q. B. 598 (1872).

<sup>68</sup> 5 Q. B. D. 414 (1880). See, also, *Davison v. Donaldson*, 9 Q. B. D. 623

In *Irvine v. Watson*, 5 Q. B. D. 623, a broker, employed by defendants to buy oil, bought from plaintiffs, telling them that he was acting for a principal, the terms being that the oil should be paid for by cash "on or before delivery." Plaintiffs delivered without payment, and defendants, not knowing that the broker had not paid, in good faith paid him. The broker soon after became insolvent. In an action for the price, it appeared that it was not the invariable custom of the oil trade to insist on prepayment in such sales, and it was held that, in the absence of such custom, the mere omission to insist on prepayment was not such conduct as would reasonably induce defendants to believe that the broker had paid for the oil, and that they were hence liable for the price. Whether mere delay on the part of the seller might not, in special cases, be sufficiently misleading conduct, as amounting to a representation that he had been paid, *quære*. See remarks of Jessel, M. R., in *Davison v. Donaldson*, 9 Q. B. D., at page 628.

topped himself by his conduct from enforcing it against the principal.

The result of the decisions in England is, therefore, that settlement with the agent on the part of the principal is a defense only when he has been induced, by words or conduct of the other party, sufficient to create an estoppel, to believe that a settlement has already been made by the agent, or, it would seem, to believe that the other party has elected to give exclusive credit to the agent,<sup>69</sup> and has himself settled with the agent in that belief.

In this country the question has been little considered, and the earlier statement of the rule has generally been approved without discussion.<sup>70</sup>

### *Contract under Seal*

It is a technical rule of the common law that no one who is not named in or described as a party to an instrument under seal can maintain an action or be charged upon it.<sup>71</sup> If, therefore, a deed or other instrument to whose validity a seal is essential is made by an agent, it must be made in the name of the principal, or he will not be a party thereto.<sup>72</sup> If a seal is affixed to a contract not required to be

<sup>69</sup> "It surely must, at all events, be the law that in the case of sale of goods to a broker the principal known or unknown cannot, by paying or settling before the time of payment comes with his own agent, relieve himself of responsibility to the seller, except in the one case where exclusive credit was given by the seller to the agent. But may the payment or settlement to or with the agent be safely made in such a case after the day of payment has arrived, and, if so, within what time? It seems to me that it can only safely be made if a delay has intervened which may reasonably lead the principal to infer that the seller no longer requires to look to the principal's credit; such a delay, for example, as leads to the inference that the debt is paid by the agent, or to the inference that, though the debt is not paid, the seller elects to abandon his recourse to the principal and to look to the agent alone." Per Bowen, J., in *Irvine v. Watson*, 5 Q. B. D. 102. See, also, remarks of Bramwell, L. J., and Brett, L. J., commenting upon *Armstrong v. Stokes*, in *Irvine v. Watson*, 5 Q. B. D. 414. And see Bowstead, Dig. Ag. art. 93.

<sup>70</sup> *Fradley v. Hyland* (C. C.) 37 Fed. 49, 2 L. R. A. 749; *Thomas v. Atkinson*, 38 Ind. 248; *Laing v. Butler*, 37 Hun (N. Y.) 144; *Knapp v. Simon*, 96 N. Y. 284, 289; *Ketchum v. Verdell*, 42 Ga. 534. Contra: *York County Bank v. Stein*, 24 Md. 447. For a review of the decisions, see 23 Am. Law Rev. 565.

<sup>71</sup> "It was resolved that when any one has authority, as attorney, to do any act, he ought to do it in his name who gives the authority; for he appoints the attorney to be in his place, and to represent his person; and therefore the attorney cannot do it in his own name, nor as his proper act, but in the name, and as the act, of him who gives the authority." *Combes' Case*, 9 Co. 75a.

<sup>72</sup> *Schack v. Anthony*, 1 M. & S. 573; *Berkeley v. Hardy*, 8 D. & R. 102; *Machesney v. Brown* (C. C.) 29 Fed. 145; *Guyon v. Lewis*, 7 Wend. (N. Y.) 26; *Stone v. Wood*, 7 Cow. (N. Y.) 453, 17 Am. Dec. 529; *Kiersted v. Orange*,

sealed, the seal may be disregarded; and in such case, if the contract is made in the name of the agent, parol evidence would be admissible, as in the case of ordinary contracts in writing, to charge the real principal or to enable him to sue.<sup>73</sup> But the decisions are conflicting.<sup>74</sup>

### *Negotiable Instrument*

Although bills of exchange, promissory notes, and other negotiable instruments are classed as simple contracts, they partake in many respects of the nature of specialties.<sup>75</sup> It is the rule of the law merchant that no one who is not named in or described as a party to the instrument can maintain an action<sup>76</sup> or be charged upon it.<sup>77</sup>

The tendency of the courts, however, has been to depart from this strict rule. It is universally conceded, indeed, that if there is nothing on the face of the paper to indicate the relation of the signer as agent to some other person, extrinsic evidence to discharge him or to charge an unnamed or undisclosed principal is inadmissible. But if such indication does appear, as where the maker adds to his signature words such as "Agent," "Treasurer of the A. Company," and the

69 N. Y. 343, 25 Am. Rep. 199; *Elwell v. Shaw*, 16 Mass. 42, 8 Am. Dec. 126; *Fullam v. Inhabitants of West Brookfield*, 9 Allen (Mass.) 1.

The common-law rule governing execution of sealed instruments by agents is not changed by a statute dispensing with seals. *Jones v. Morris*, 61 Ala. 518; *Sanger v. Warren*, 91 Tex. 472, 44 S. W. 477, 66 Am. St. Rep. 913 (the rule not changed by statute providing that no seal is necessary to validity of any instrument in writing, and that addition or omission of seal shall not affect the same). *Contra*: *Gibbs v. Dickson*, 33 Ark. 107.

<sup>73</sup> *Lancaster v. Ice Co.*, 153 Pa. 427, 26 Atl. 251; *Stowell v. Eldred*, 39 Wis. 614. See, also, *Blanchard v. Inhabitants of Blackstone*, 102 Mass. 343; *Cook v. Gray*, 133 Mass. 106.

<sup>74</sup> An undisclosed principal cannot sue on a sealed contract, executed by the agent as such, though the seal is not essential to its validity. *Smith v. Pierce*, 45 App. Div. 628, 60 N. Y. Supp. 1011; *Stanton v. Granger*, 125 App. Div. 174, 109 N. Y. Supp. 134, aff. 193 N. Y. 656, 87 N. E. 1127. Yet even in New York the stranger for whose benefit the promise is made may sue upon it, see *Gifford v. Corrigan*, 117 N. Y. 257, 22 N. E. 756, 6 L. R. A. 610, 15 Am. St. Rep. 508.

<sup>75</sup> 2 Ames, Cas. B. & N. 872; *Daniels*, Neg. Instr. § 692.

<sup>76</sup> *Grist v. Backhouse*, 20 N. C. 496; *Bank of United States v. Lyman*, 20 Vt. 666, Fed. Cas. No. 924; *Fuller v. Hooper*, 3 Gray (Mass.) 341. Otherwise if note is not negotiable. *National Life Ins. Co. v. Allen*, 116 Mass. 398.

<sup>77</sup> *Liffkin v. Walker*, 2 Camp. 308; *In re Ansonia Co.*, L. R. 9 Ch. 635; *Pentz v. Stanton*, 10 Wend. (N. Y.) 271, 25 Am. Dec. 558; *Stackpole v. Arnold*, 11 Mass. 27, 6 Am. Dec. 150; *Williams v. Robbins*, 16 Gray (Mass.) 77, 77 Am. Dec. 396; *Arnold v. Sprague*, 34 Vt. 409; *Pease v. Pease*, 35 Conn. 131, 95 Am. Dec. 225; *Cragin v. Lovell*, 109 U. S. 194, 3 Sup. Ct. 132, 27 L. Ed. 903; *Babbett v. Young*, 51 N. Y. 238.



like,<sup>78</sup> or where the indication otherwise appears upon the face of the instrument,<sup>79</sup> it is very generally held that, although the added words are *prima facie* mere descriptio personæ, yet, if it was understood between the immediate parties that the contract was in fact the contract of the principal, parol evidence of such intention is admissible, as between them, and as between the maker and a subsequent holder, who took with knowledge of the actual facts, for the purpose of showing that the obligation is in fact the principal's.

There are, indeed, many conflicting decisions regarding the construction of such instruments, and the questions what form is sufficient to bind the principal, and what to bind the agent, and, under what circumstances, if at all, parol evidence is admissible to solve an ambiguity.<sup>80</sup>

But, although a principal cannot be sued upon a negotiable instrument, where his name does not appear therein, some cases have held that an action may be maintained against him upon the consideration.<sup>81</sup>

<sup>78</sup> *Metcalf v. Williams*, 104 U. S. 93, 26 L. Ed. 665; *Case Mfg. Co. v. Soxman*, 138 U. S. 431, 11 Sup. Ct. 360, 34 L. Ed. 1019; *Kean v. Davis*, 21 N. J. Law, 683, 47 Am. Dec. 182; *Brockway v. Allen*, 17 Wend. (N. Y.) 40; *Haile v. Peirce*, 32 Md. 327, 3 Am. Rep. 139; *Lafin & Rand Powder Co. v. Sinsheimer*, 48 Md. 411, 30 Am. Rep. 472; *Lockwood v. Coley* (C. C.) 22 Fed. 192; *Martin v. Smith*, 65 Miss. 1, 3 South. 33; *Keidan v. Winegar*, 95 Mich. 430, 54 N. W. 901, 20 L. R. A. 705; *Second Nat. Bank v. Steel Co.*, 155 Ind. 581, 58 N. E. 833, 52 L. R. A. 307 (overruling earlier decisions); *La Salle Nat. Bank v. Rock & Ry. Co.*, 14 Ill. App. 141; *Brunswick-Balke-Collender Co. v. Boutell*, 45 Minn. 21, 47 N. W. 261; *McClellan v. Reynolds*, 49 Mo. 312; *Kline v. Bank*, 50 Kan. 91, 31 Pac. 688, 18 L. R. A. 533, 34 Am. St. Rep. 107; *Miller v. Way*, 5 S. D. 468, 59 N. W. 467; *Janes v. Bank*, 9 Okl. 546, 60 Pac. 290.

<sup>79</sup> *Mechanics' Bank v. Bank*, 5 Wheat. (U. S.) 326, 5 L. Ed. 100. In this case a check, with the words "Mechanics' Bank of Alexandria," at the top and in the margin, drawn on the Bank of Columbia, and payable to the order of P. H. Minor, was signed Wm. Paton, Jr. Parol evidence was admitted to show that he was cashier of the former bank, and to establish the official character of the check. Johnson, J., said: "The appearance of the corporate name of the institution on the face of the paper at once leads to the belief that it is a corporate, and not an individual, transaction; to which must be added \* \* \* that the cashier is the drawer, and the teller the payee, and the form of ordinary checks deviated from by the substitution of 'to order' for 'to bearer.' The evidence, therefore, on the face of the bill predominates in favor of its being a bank transaction." This is a leading case upon the admission of parol evidence, and carries the doctrine to its extreme limit. See *First Nat. Bank v. Wallis*, 150 N. Y. 455, 44 N. E. 1038.

<sup>80</sup> See *Tiffany*, Ag. p. 332; *Mechem*, Ag. (2d Ed.) § 1150 et seq.

<sup>81</sup> *Coaling Co. v. Howard*, 130 Ga. 807, 61 S. E. 987, 21 L. R. A. (N. S.) 1051; *Kayton v. Barnett*, 116 N. Y. 625, 23 N. E. 24.

*Same—Public Agents*

A different rule prevails in respect to public agents. Where a contract is entered into or a deed executed in behalf of the government by an authorized public agent, notwithstanding that the agent may have executed it in his own name, it is the contract or deed of the government, who alone is responsible. To be binding upon the agent, his intent to be bound must clearly appear.<sup>82</sup> It seems that the same rule is applicable to negotiable paper, and it has frequently been held that where an instrument executed by a public agent contains words which, if used by a private agent, would be deemed mere descriptio personæ, the principal, and not the agent, is bound.<sup>83</sup> In other cases, however, the distinction has been disregarded.<sup>84</sup>

**WHEN AGENT ACTS WITHOUT AUTHORITY—IMPLIED WARRANTY OF AUTHORITY**

19. Every person who professes to contract as agent is deemed to warrant that he is in fact authorized to make the contract. When any such representation is made fraudulently, the person injured may sue in tort for the deceit.

When a person without authority makes a contract on behalf of another, the latter is not bound unless he ratifies the contract. If the professed agent contracts in his own name he is, of course, personally liable on the contract. If, however, he contracts in the name of the ostensible principal, the professed agent is not liable on the contract, because it does not purport to be his, and to hold him liable on it would be "to make a contract, not to construe it."<sup>85</sup> This rule is sustained by principle and authority, though there are some decisions

<sup>82</sup> *Union v. Wolsely*, 1 T. R. 674; *Hodgson v. Dexter*, 1 Cranch, 345, 2 L. Ed. 130; *Knight v. Clark*, 48 N. J. Law, 22, 2 Atl. 780, 57 Am. Rep. 534; *Hall v. Lauderdale*, 46 N. Y. 70.

<sup>83</sup> *Jones v. Le Tombe*, 3 Dall. 384, 1 L. Ed. 647; *School Town of Monticello v. Kendall*, 72 Ind. 91, 37 Am. Rep. 139; *Sanborn v. Neal*, 4 Minn. 126 (Gil. 83), 77 Am. Dec. 502. Cf. *Fowler v. Atkinson*, 6 Minn. 579 (Gil. 412).

<sup>84</sup> *Schools of Village of Cahokia v. Rautenberg*, 88 Ill. 219; *Wing v. Glick*, 56 Iowa, 473, 9 N. W. 384, 41 Am. Rep. 118.

<sup>85</sup> *Jenkins v. Hutchinson*, 13 Q. B. 744; *Lewis v. Nicholson*, 18 Q. B. 503; *Ballou v. Talbot*, 16 Mass. 461, 8 Am. Dec. 146; *Bartlett v. Tucker*, 104 Mass. 336, 6 Am. Rep. 240; *Noyes v. Loring*, 55 Me. 408; *White v. Madison*, 26 N. Y. 117; *Dung v. Parker*, 52 N. Y. 494; *Duncan v. Niles*, 32 Ill. 532, 83 Am. Dec. 293; *McCurdy v. Rogers*, 21 Wis. 199, 91 Am. Dec. 468; *Sheffield v. Ladue*, 16 Minn. 388 (Gil. 346), 10 Am. Rep. 145; *Cole v. O'Brien*, 34 Neb. 68, 51 N. W. 316, 33 Am. St. Rep. 616; *Hall v. Crandall*, 29 Cal. 567, 89 Am. Dec. 64; *Senter v. Monroe*, 77 Cal. 347, 19 Pac. 580.

which hold him liable on the contract.<sup>86</sup> The remedy of the third person who contracts with the professed agent in reliance upon the authority which he asserts, but does not possess, must, therefore, be sought in some other form of action than an action on the contract.

If the agent fraudulently represents that he is authorized when he is not, he is, upon familiar principles, liable in an action of tort, for deceit; and this, whether the representation of authority is express or is merely implied from his assuming to act as one having authority.<sup>87</sup> On the other hand, if he honestly but mistakenly believes that he has authority, he is not liable in an action of deceit.

The effect of the foregoing doctrines being to leave a person who enters into a contract with another as agent without remedy where the professed agent has acted under a mistaken belief that he has authority, as in the case of a supposed agent acting under a forged power of attorney, which he believes to be genuine, has led the courts to resort to the theory of an implied contract or warranty of authority.<sup>88</sup>

The implied undertaking or warranty of the agent extends as well to cases in which he exceeds his authority as to cases in which he has no authority at all. Nor is the rule confined to the case of one person inducing another to enter into a contract; for, if the professed agent induces the other to enter into any transaction which he would not

<sup>86</sup> *Roberts v. Button*, 14 Vt. 195; *Weare v. Gove*, 44 N. H. 196; and see *Terwilliger v. Murphy*, 104 Ind. 32, 3 N. E. 404; *Solomon v. Penoyar*, 89 Mich. 11, 50 N. W. 644; *Dusenbury v. Ellis*, 3 Johns. Cas. (N. Y.) 70, 2 Am. Dec. 144, and other early New York cases to the same effect, have been overruled. *White v. Madison*, 26 N. Y. 117; *Simmons v. More*, 100 N. Y. 140, 2 N. E. 640.

<sup>87</sup> See *Pothill v. Walker*, 3 B. & Ad. 114; *Randell v. Trimen*, 18 C. B. 786; *Smout v. Ilbery*, 10 M. & W. 1; *May v. Western Union Telegraph Co.*, 112 Mass. 90; *Kroeger v. Pitcairn*, 101 Pa. 311, 47 Am. Rep. 718; *Noyes v. Loring*, 55 Me. 408; *White v. Madison*, 26 N. Y. 117; *Dung v. Parker*, 52 N. Y. 494; *Duncan v. Niles*, 32 Ill. 532, 83 Am. Dec. 293; *Williams v. De Soto Oil Co.*, 213 Fed. 194, 129 C. C. A. 538; *Wallace v. Bozarth*, 223 Ill. 339, 79 N. E. 57.

<sup>88</sup> *Collen v. Wright*, 8 El. & B. 647; *Richardson v. Williamson*, L. R. 6 Q. B. 276; *Weeks v. Propert*, L. R. 8 C. P. 427; *Re National Coffee Palace Co.*, 24 Ch. D. 367; *Stuart v. Haight*, 9 T. L. R. 488; *Oliver v. Bank of England*, [1902] 1 Ch. 210 (forged power); *Baltzen v. Nicolay*, 53 N. Y. 467; *White v. Madison*, 26 N. Y. 117; *Simmons v. More*, 100 N. Y. 140, 2 N. E. 640; *Taylor v. Nostrand*, 134 N. Y. 108, 31 N. E. 246; *Kroeger v. Pitcairn*, 101 Pa. 311, 47 Am. Rep. 718; *Lane v. Corr*, 156 Pa. 250, 25 Atl. 830; *Patterson v. Lippincott*, 47 N. J. Law, 457, 1 Atl. 506, 54 Am. Rep. 178; *Farmers' Co-op. Trust Co. v. Floyd*, 47 Ohio St. 525, 26 N. E. 110, 12 L. R. A. 346, 21 Am. St. Rep. 846; *Seeberger v. McCormick*, 178 Ill. 404, 53 N. E. 340; *Skaaras v. Finnegan*, 31 Minn. 48, 16 N. W. 456; *Id.*, 32 Minn. 107, 19 N. W. 729.

Some cases have placed the liability on the ground of fraud, others on that of express contract. See *Farmers' Co-op. Trust Co. v. Floyd*, *supra*.

have entered into but for the representation of authority, the rule applies.<sup>89</sup>

*Same—Principal Incapable*

The want of authority may arise from a lack of legal capacity on the part of the principal. In such case it seems that the assuming agent is liable upon the implied warranty,<sup>90</sup> unless the parties, being equally informed as to the facts, act under a mutual mistake of law or of fact.<sup>91</sup>

*When Circumstances Negative Warranty*

If the contract is made on such terms that the agent stipulates that he shall not be responsible for any want of authority, no warranty of authority will be implied, at least in the absence of bad faith on his part. Thus, where a broker signed a charter party "per telegraphic authority," evidence was admitted to prove that when charters are entered into by brokers in accordance with telegraphic instructions it was usual to sign in that form, and that it was understood in the trade as negating the implication of a warranty by the charterer's agent, at all events, to a greater extent than warranting that he had a telegram which, if correct, authorized such a charter.<sup>92</sup> And if the agent, acting in good faith, discloses all the facts upon which his

<sup>89</sup> Plaintiff having entered into a binding contract with a company to accept its debenture stock in payment of a debt, defendant directors issued stock, which without their knowledge was an overissue. Held, that they were liable on an implied warranty that they had authority to issue valid stock. *Firbank's Ex'rs v. Humphreys*, 18 Q. B. D. 60.

Where a broker, believing himself authorized under a power of attorney which proved to be a forgery, procured the Bank of England to allow him to transfer consols, to its loss, a recovery against him was allowed. *Oliver v. Bank of England*, [1902] 1 Ch. 610. See 16 Harv. L. Rev. 311.

<sup>90</sup> Where directors of a company which had no power to accept bills accepted on its behalf, they were personally liable to a purchaser without notice, on an implied warranty of authority, the company's powers being defined by private act, and the representation held to be of fact, and not of law. *West London Com. Bank v. Kitson*, 13 Q. B. D. 360.

Agent is liable who contracts for a foreign corporation incompetent because of failure to comply with state statutes. *Jos. T. Ryerson & Son v. Shaw*, 277 Ill. 520, 115 N. E. 650.

In *Patterson v. Lippincott*, 47 N. J. Law, 457, 1 Atl. 506, 54 Am. Rep. 178, it was held that the infancy of the principal was not a breach of the warranty of authority, unless the act of the professed agent was entirely without the infant's knowledge or consent, since the contract, if authorized, would be voidable, and not void.

<sup>91</sup> *Jefts v. York*, 10 Cush. (Mass.) 392; *Merchants' & Planters' Packet Co. v. Strenby*, 91 Miss. 211, 44 South. 791, 124 Am. St. Rep. 651; *Fowle v. Kerchner*, 87 N. C. 49. And see *Smout v. Ilbery* in next paragraph.

<sup>92</sup> *Lilly v. Smales*, [1892] 1 Q. B. 456.



authority rests, no warranty of authority can be implied.<sup>93</sup> Thus, where the defendant, after the death of her husband, but before she was informed of the fact, ordered goods from the plaintiff, who had previously supplied her on the credit of the husband, and been paid for them by him, the husband to the knowledge of the plaintiff being resident abroad, it was held that she was not liable on an implied warranty, the continuance of the life of the principal being, under the circumstances, a fact equally within the knowledge of both contracting parties, and there having been no failure on her part to state any fact within her knowledge relating to the continuance of the authority.<sup>94</sup> In this case the authority of the agent turned upon a question of fact, namely, the continuance of the authority dependent upon the life of the principal. When the agent makes full disclosure of the facts constituting his authority, as where he shows to the other party the power of attorney or letter of instructions under which he acts, the question of his authority becomes a mere question of construction, or of law, and no warranty of the sufficiency of the authority can be implied.<sup>95</sup>

#### *When no Principal in Existence*

Where a person professes to contract in the name of an alleged principal, but no such principal is in existence, it has been declared that the professed agent is liable upon the contract. Thus, where a contract was entered into by the promoters of a proposed corporation on its behalf, in which case, as we have seen, there can be no ratification, since to admit of ratification the contract must be made on behalf of some person in existence, it was held that the professed agents were bound. "Where a contract is signed," said Earle, C. J., "by one who professes to be signing 'as agent,' but who has no principal existing at the time, and the contract would be altogether inoperative unless binding upon the person who signed it, he is bound thereby; and a stranger cannot by a subsequent ratification relieve him from that responsibility."<sup>96</sup> The contract, which in terms described the corporation as "proposed," was construed as one in which the parties contemplated that the persons signing should be personally liable. The existence of any rule which, by reason of there not being at the time

<sup>93</sup> *Smout v. Ilbery*, 10 M. & W. 1; *Hall v. Lauderdale*, 46 N. Y. 72; *Ware v. Morgan*, 67 Ala. 461; *Newman v. Sylvester*, 42 Ind. 106; *Michael v. Jones*, 84 Mo. 578; *Barry v. Pike*, 21 La. Ann. 221.

<sup>94</sup> *Smout v. Ilbery*, 10 M. & W. 1.

<sup>95</sup> *Beattie v. Ebury*, L. R. 7 Ch. 777, affirmed L. R. 7 H. L. 102 (cf. *West London Com. Bank v. Kitson*, 13 Q. B. D. 360); *McReavy v. Eshelman*, 4 Wash. 757, 31 Pac. 35; *Patterson v. Lippincott*, 47 N. J. Law, 457, 1 Atl. 506, 54 Am. Rep. 178; *Fulton v. Sewall*, 116 App. Div. 744, 102 N. Y. Supp. 109.

<sup>96</sup> *Kelner v. Baxter*, L. R. 2 C. P. 174.

any principal in existence who can be bound, can convert the position of a person signing the name of an alleged principal, without using language indicating an intention to be bound personally, into the position of a contracting party, has been doubted.<sup>97</sup> There is, however, some authority for holding personally liable upon this ground a person who contracts professedly on behalf of a voluntary association,<sup>98</sup> which, being neither a corporation nor a partnership, is not a legal entity.

When, however, it is understood that the agent shall not be held, and the other party, with knowledge of the facts, extends credit to the supposed principal, the agent is not liable.<sup>99</sup>

When the agent is liable on the contract, instead of on his implied warranty of authority, a subsequent ratification, or adoption, while it may bind the principal, does not relieve the agent.<sup>1</sup>

## LIABILITY ON QUASI CONTRACT—MONEY RECEIVED

20. Where money is paid by a third person to an agent for the use of his principal, under such circumstances that it may be recovered, the agent, as well as the principal, is liable to repay the same; provided that the money is reclaimed before he has in good faith paid it over, or dealt to his detriment with his principal on the faith of the payment.

### *Money Received in Good Faith*

While an agent who contracts as such for a disclosed principal is not as a rule liable personally upon the contract, he may be liable to repay money which has been paid to him as agent by a third person, in an action for money had and received to the plaintiff's use. Although the agent has acted in good faith, as where the money has been paid

<sup>97</sup> *Hollman v. Pullin*, 1 Cababe & E. 254. See, also, *Jones v. Hope*, 3 T. L. R. 247; *Bartlett v. Tucker*, 104 Mass. 336, 6 Am. Rep. 240. See *Fulton v. Sewall* in note 95, ante.

<sup>98</sup> *Lewis v. Tilton*, 64 Iowa, 220, 19 N. W. 911, 52 Am. Rep. 436; *Reding v. Anderson*, 72 Iowa, 498, 34 N. W. 300; *Comfort v. Graham*, 87 Iowa, 295, 54 N. W. 242. See, also, *Learn v. Upstill*, 52 Neb. 271, 72 N. W. 213; *Codding v. Munson*, 52 Neb. 580, 72 N. W. 846, 66 Am. St. Rep. 524; *Thistle v. Jones*, 45 Misc. Rep. 215, 92 N. Y. Supp. 113 (dictum).

<sup>99</sup> *Belding v. Vaughan*, 108 Ark. 69, 157 S. W. 400; *Codding v. Munson*, 52 Neb. 580, 72 N. W. 846, 66 Am. St. Rep. 524; *Von Lengerke v. City of New York*, 150 App. Div. 98, 134 N. Y. Supp. 832. And see *Fulton v. Sewall*, in note 95, ante.

<sup>1</sup> See *Kelner v. Baxter* in note 96, ante; *Lazarus v. Shearer*, 2 Ala. 718; *Arfvidson v. Ladd*, 12 Mass. 173; *Palmer v. Stephens*, 1 Denio (N. Y.) 472; *Rossiter v. Rossiter*, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62.

to him under a mistake of fact, he is nevertheless liable to repay it, provided the party who made the payment reclaims it before he has paid it over or otherwise dealt to his detriment with his principal on the faith of the payment;<sup>2</sup> but, if he has in the meantime paid it over or so dealt with his principal, he is not liable.<sup>3</sup> "An agent," said Lord Ellenborough, "who receives money for his principal is liable as a principal so long as he stands in his original situation, and until there has been a change of circumstances by his having paid over the money to his principal, or done something equivalent to it."<sup>4</sup> Payment to another, on behalf of the principal on faith of the credit, is equivalent to payment to the principal;<sup>5</sup> but merely crediting him with the amount is not.<sup>6</sup> Notice need not be formal, but must be such as to apprise the agent of the facts and of the intention of the other party by reason thereof to reclaim the money.<sup>7</sup> If the agent did not disclose his agency, and the other party dealt with him as principal, payment over to the real principal will be no defense.<sup>8</sup>

In all the foregoing cases, the principal is, of course, equally liable with the agent; the other party having an election between them.<sup>9</sup>

Such cases are to be distinguished from those in which the agent receives money as a stakeholder, as where an auctioneer receives a deposit, in which case he is liable to refund on default of the vendor, it being his duty to hold as stakeholder until the completion or rescission of the contract.<sup>10</sup>

<sup>2</sup> Buller v. Harrison, Cowp. 565; Cox v. Prentice, 3 M. & S. 344; La Farge v. Kneeland, 7 Cow. (N. Y.) 456; Mowatt v. McLellan, 1 Wend. (N. Y.) 173; O'Connor v. Clopton, 60 Miss. 349; Smith v. Binder, 75 Ill. 492; Granger v. Hathaway, 17 Mich. 500; Shepard v. Sherin, 43 Minn. 382, 45 N. W. 718; Hausten v. Ruh, 73 N. J. Law, 98, 62 Atl. 184; Cabot v. Shaw, 148 Mass. 459, 20 N. E. 99; U. S. Nat. Bank v. Nat. Park Bank, 59 Hun, 495, 13 N. Y. Supp. 411, affirmed 129 N. Y. 647, 29 N. E. 1028.

<sup>3</sup> Holland v. Russell, 4 B. & S. 14; United States v. Pinover (D. C.) 3 Fed. 305; Cabot v. Shaw, 148 Mass. 459, 20 N. E. 99.

<sup>4</sup> Cox v. Prentice, 3 M. & S. 344.

<sup>5</sup> Cabot v. Shaw, 148 Mass. 459, 20 N. E. 99.

<sup>6</sup> Buller v. Harrison, Cowp. 565; Cox v. Prentice, 3 M. & S. 344.

<sup>7</sup> Shepard v. Sherin, 43 Minn. 382, 45 N. W. 718.

<sup>8</sup> Newall v. Tomlinson, L. R. 6 C. P. 405; Smith v. Kelly, 43 Mich. 390, 5 N. W. 437. See, also, United States v. Pinover (D. C.) 3 Fed. 305, 309.

<sup>9</sup> Where one entitled to elect whether he will hold an agent or a principal who holds money which he is *ex æquo et bono* entitled to receive makes such election, he renounces all remedies against the other party. Eufaula Grocery Co. v. Bank, 118 Ala. 408, 24 South. 389.

See Bowstead, Dig. Ag. art. 117.

He may not tie up the money in the hands of the agent and at the same time proceed against the principal. Cook v. Cook, 28 Ala. 660.

<sup>10</sup> Burrough v. Skinner, 5 Burr. 2639; Edwards v. Hodding, 1 Marsh. 377; Gray v. Gutteridge, 3 C. & P. 40.

It has been held that, when money is paid to an agent for a consideration which subsequently fails, an action for its recovery must be against the principal.<sup>11</sup> In this case a good title vests in the principal immediately and the agent becomes absolutely bound to pay it over.<sup>12</sup>

#### *Money Obtained Wrongfully*

If the agent has obtained the money wrongfully, he is liable to repay it in any event, although he has paid it over to his principal or otherwise dealt with him to his detriment on the faith of the payment without notice or demand from the other party. Thus, he is so liable if he obtains the money by extortion or illegal exaction,<sup>13</sup> or by fraud,<sup>14</sup> or under other circumstances which to his knowledge make it illegal for him to receive it.<sup>15</sup> Principal and agent, being joint tort-feasors, may be sued either together or separately.<sup>16</sup> Of course, if the wrong was that of the principal, and was not participated in or known by the agent, payment to the principal is a defense.<sup>17</sup>

### OBLIGATIONS BETWEEN PRINCIPAL AND AGENT— DUTIES OF AGENT TO PRINCIPAL

#### 21. It is the duty of the agent—

To obey instructions;

To exercise such skill, care, and diligence as the circumstances of the undertaking require;

To act in good faith; and

To account for all money, property, or profits received by virtue of his employment.

<sup>11</sup> *Ellis v. Goulton*, [1893] 1 Q. B. 350; *Bleau v. Wright*, 110 Mich. 183, 68 N. W. 115; *Langley v. Warner*, 3 N. Y. 327; *Kurzwaski v. Schneider*, 179 Pa. 500, 36 Atl. 319. Contra: *Smith v. Binder*, 75 Ill. 492.

<sup>12</sup> See *Mechem, Ag.* (2d Ed.) § 1436.

<sup>13</sup> *Snowdon v. Davis*, 1 Taunt. 359 (payment under terror of illegal distress); *Smith v. Sleaf*, 12 M. & W. 585 (withholding documents to obtain more money than is due); *Elliott v. Swartwout*, 10 Pet. 137, 9 L. Ed. 373; *United States v. Pinover* (D. C.) 3 Fed. 305, 309; *Ripley v. Gelston*, 9 Johns. (N. Y.) 201, 6 Am. Dec. 271; *Frye v. Lockwood*, 4 Cow. (N. Y.) 454.

<sup>14</sup> *Moore v. Shields*, 121 Ind. 267, 23 N. E. 89; *Hardy v. Express Co.*, 182 Mass. 328, 65 N. E. 375, 59 L. R. A. 731.

<sup>15</sup> *Ex parte Edwards*, 13 Q. B. D. 747 (receiving money from debtor with notice of act of bankruptcy); *Sharland v. Mildon*, 5 Hare, 469; *Larkin v. Hapgood*, 56 Vt. 597 (money paid in fraud of insolvent law); *Hearsey v. Pruyn*, 7 Johns. (N. Y.) 179; *Grover v. Morris*, 73 N. Y. 473, *Hardy v. Am. Exp. Co.*, 182 Mass. 328, 65 N. E. 375, 59 L. R. A. 731.

<sup>16</sup> 2 Corpus Juris, 903, note 65.

<sup>17</sup> *Owen v. Cronk*, [1895] 1 Q. B. 265.



### SAME—DUTIES OF PRINCIPAL TO AGENT

It is the duty of the principal—

To pay the agent the remuneration agreed upon;

To reimburse the agent for expenses incurred in the execution of his authority;

To indemnify the agent against the consequences of acts performed in the execution of the agency.

The obligations of principal and agent are to a great extent determined by the contract of employment or the terms of the appointment. Their mutual undertakings may be express, but in most cases are to a greater or less extent to be implied from the nature and the circumstances of the particular agency. In so far as the parties assume the relation of master and servant, or bailor and bailee, they are governed by the rules applicable to those relations. The peculiar obligations of some classes of agents, such as factors and brokers, are defined by usage. Certain duties, however, resting upon the parties, result from the very nature of the relation and are common to all agencies, except so far as they may be modified by express agreement, or by the understanding of the parties to be implied from the particular circumstances. The duties of this character naturally fall under the heads enumerated in the black-letter text. In the main, they are identical with those existing between master and servant; but the duty of good faith on the part of the agent is characteristic of this kind of service.

### SAME—DUTY OF AGENT TO ACT IN GOOD FAITH

22. It is the duty of the agent to exercise good faith and loyalty toward the principal in the transaction of the business intrusted to him. This requires—
- (a) That he shall not assume any position in which his interests will be antagonistic to those of the principal.
  - (b) That he shall not assert the adverse interests or title of third parties to defeat the rights of his principal.
  - (c) That he shall give notice to the principal of all facts relative to the business of the agency coming to his knowledge which may affect the principal's interests.

#### *In General*

The duty of the agent to exercise good faith results from the fiduciary character of the relation and is similar to that of trustees, exec-

utors, guardians, and the like.<sup>18</sup> Of necessity, the principal must repose confidence in the agent, and must rely upon his good faith and loyalty to the interest which is committed to him. The agent must therefore act solely in the interest of his employer, and not in his own interest, or in the interest of another. No person while acting as agent may enter into any transaction in which he has any personal interest, or take a position in conflict with the interest of his principal, unless the principal, with full knowledge of all the facts, consents.<sup>19</sup> Whenever such a transaction is entered into, the principal, when the facts come to his knowledge, may repudiate the transaction, or may adopt it and claim an account of the profit made by the agent,<sup>20</sup> and the agent forfeits all claim to compensation.<sup>21</sup>

### *Acting as Agent and Party*

It is a breach of the confidence upon which the relation rests for the agent to unite the inconsistent relations of agent and party in the same transaction. When the agent assumes to deal with himself in a matter in which he is expected to deal with third persons, his own interest and that of his principal are necessarily antagonistic; and the principal may repudiate the transaction irrespective of whether or not it has resulted in loss and without regard to its bona fides.<sup>22</sup> An agent em-

<sup>18</sup> Eaton, Eq. 321.

<sup>19</sup> Gillett v. Peppercorn, 3 Beav. 78; Michoud v. Girod, 4 How. 503, 555, 11 L. Ed. 1076; Wadsworth v. Adams, 138 U. S. 380, 11 Sup. Ct. 303, 34 L. Ed. 984; Keighler v. Savage Manufacturing Co., 12 Md. 383, 71 Am. Dec. 600; Davoue v. Fanning, 2 Johns. Ch. (N. Y.) 252; Farnsworth v. Hemmer, 1 Allen (Mass.) 494, 79 Am. Dec. 756; Lem v. Wilson, 27 Cal. App. 512, 150 P. 641; Spotswood v. Estes, 165 Ky. 743, 178 S. W. 1082; Malden & Melrose Gaslight Co. v. Chandler, 211 Mass. 226, 97 N. E. 906; Reis & Co. v. Volck, 151 App. Div. 613, 136 N. Y. Supp. 367.

<sup>20</sup> See Bowstead, Dig. Ag. 102.

<sup>21</sup> Wadsworth v. Adams, 138 U. S. 380, 11 Sup. Ct. 303, 34 L. Ed. 984; Allen v. Pierpont (C. C.) 22 Fed. 582; Blair v. Shaeffer (C. C.) 33 Fed. 218; Sea v. Carpenter, 16 Ohio, 412; Martin v. Bliss, 57 Hun, 157, 10 N. Y. Supp. 886; Porter v. Silvers, 35 Ind. 295; Brannan v. Strauss, 75 Ill. 234; Segar v. Parrish, 20 Grat. (Va.) 672; Urquhart v. Scottish-American Mortgage Co., 85 Minn. 69, 88 N. W. 264; Schleifenbaum v. Rundbaken, 81 Conn. 623, 71 Atl. 899; Murray v. Beard, 102 N. Y. 505, 7 N. E. 553; Madden v. Davis, 192 Ill. App. 575.

<sup>22</sup> Gillett v. Peppercorn, 3 Beav. 78; Aberdeen Ry. v. Blakie, 2 Eq. R. 1281; Michoud v. Girod, 4 How. 503, 11 L. Ed. 1076; New York Cent. Ins. Co. v. National Protection Ins. Co., 14 N. Y. 85; Taussig v. Hart, 58 N. Y. 425; Maryland Fire Ins. Co. v. Dalrymple, 25 Md. 242, 89 Am. Dec. 779; People ex rel. Plugger v. Township Board of Overysse, 11 Mich. 222; Green v. Knoch, 92 Mich. 26, 52 N. W. 80.

ployed to buy may not buy from himself,<sup>23</sup> nor may an agent to sell become the purchaser.<sup>24</sup>

### *Acting as Agent for Both Parties*

When the agent assumes antagonistic positions as agent for both, either may repudiate the transaction;<sup>25</sup> nor can the agent recover compensation from either<sup>26</sup> unless both consent to the double agency.<sup>27</sup>

<sup>23</sup> Gillett v. Peppercorn, 3 Beav. 78; Bentley v. Craven, 18 Beav. 75; Bischoffsheim v. Baltzer (C. C.) 20 Fed. 890; Conkey v. Bond, 36 N. Y. 427; Disbrow v. Secor, 58 Conn. 35, 18 Atl. 981; Colbert v. Shepherd, 89 Va. 401, 16 S. E. 246; Friesenhahn v. Bushnell, 47 Minn. 443, 50 N. W. 597; Sandoval v. Randolph, 222 U. S. 161, 32 Sup. Ct. 48, 56 L. Ed. 142; Heckscher v. Edenborn, 203 N. Y. 210, 96 N. E. 441.

<sup>24</sup> Oliver v. Court, Dan. 301; Bentley v. Craven, 18 Beav. 75; Jeffries v. Wiester, 2 Sawy. 135, Fed. Cas. No. 7,254; Copeland v. Insurance Co., 6 Pick. (Mass.) 198; Greenfield Sav. Bank v. Simons, 133 Mass. 415; Bain v. Brown, 56 N. Y. 285; Martin v. Moulton, 8 N. H. 504; Parker v. Vose, 45 Me. 54; Doe ex dem. Allen v. Roe, 31 Ga. 544; Grumley v. Webb, 44 Mo. 444, 100 Am. Dec. 304; Euneau v. Rieger, 105 Mo. 659, 16 S. W. 854; Francis v. Kerker, 85 Ill. 190; Hodgson v. Raphael, 105 Ga. 480, 30 S. E. 416; Dana v. Trust Co., 99 Wis. 663, 75 N. W. 429; Baker v. Schofield, 221 Fed. 322, 136 C. C. A. 320; Hall v. Paine, 224 Mass. 62, 112 N. E. 153, L. R. A. 1917C, 737; Ruckman v. Bergholz, 37 N. J. Law, 437; Post v. Thomas, 153 App. Div. 865, 139 N. Y. Supp. 6 (reversed on other grounds, 212 N. Y. 264, 106 N. E. 69).

The clerk of a broker employed to sell land, who has access to the correspondence with the seller, stands in such a relation of confidence to the latter that if he becomes the purchaser he is chargeable as trustee. Gardner v. Ogden, 22 N. Y. 327, 78 Am. Dec. 192. See, also, Hobday v. Peters, 28 Beav. 349; Poillon v. Martin, 1 Sandf. Ch. (N. Y.) 569.

But if a sale to a third person is consummated the agency is so far terminated that the agent may agree to take the property from the purchaser and assume his obligations. Robertson v. Chapman, 152 U. S. 673, 11 Sup. Ct. 741, 38 L. Ed. 592.

<sup>25</sup> Hesse v. Briant, 6 De G., M. & G. 623; New York Cent. Ins. Co. v. National Protection Insurance Co., 14 N. Y. 85; Utica Ins. Co. v. Toledo Insurance Co., 17 Barb. (N. Y.) 132; Shirland v. Monitor Iron Works Co., 41 Wis. 162; Fish v. Leser, 69 Ill. 394; Mercantile Mut. Ins. Co. v. Hope Insurance Co., 8 Mo. App. 408; Dull v. Royal Ins. Co., 159 Mich. 671, 124 N. W. 533; Sternberger v. Young, 73 N. J. Eq. 586, 75 Atl. 807; Carr v. National Bank & Loan Co. of Watertown, 167 N. Y. 375, 60 N. E. 649, 82 Am. St. Rep. 725.

An insurance agent who has been directed by his company to reduce a risk either by cancellation or reinsurance cannot reinsure in another company of which also he is agent, without its consent. Empire State Ins. Co. v. American Cent. Ins. Co., 138 N. Y. 446, 34 N. E. 200.

<sup>26</sup> Walker v. Osgood, 98 Mass. 348, 93 Am. Dec. 168; Rice v. Wood, 113 Mass. 133, 18 Am. Rep. 459; Bollman v. Loomis, 41 Conn. 581; Lynch v. Fal-

<sup>27</sup> Bell v. McConnell, 37 Ohio St. 396, 41 Am. Rep. 528, and cases there cited. Meyer v. Hanchett, 43 Wis. 246 (semble); Joslin v. Cowee, 56 N. Y. 626; Patterson v. Van Loon, 186 Pa. 367, 40 Atl. 495; Pardee v. Crane & Co., 74 W. Va. 359, 82 S. E. 340. Contra: Lynch v. Fallon, 11 R. I. 311, 23 Am. Rep. 458.

But if there is no conflict between the interests of the two principals, as where the terms of sale have been fixed by the seller, or are to be fixed by agreement between the parties, and the duty of the agent is solely to bring buyer and seller together, so that nothing is left to his discretion, he may act as agent for both.<sup>28</sup>

### *Acquiring Adverse Interest*

The agent may not acquire, without the consent of the principal, any interest in the subject-matter of the agency or any rights adverse to him based on a violation of instructions, a neglect of duty, or an abuse of the confidence reposed.

An agent employed to purchase property may not purchase in his own name or on his own behalf, and if he does so he will hold it as trustee.<sup>29</sup> And although he uses his own funds, he may be compelled upon tender of the purchase price and his reasonable compensation to convey to his principal.<sup>30</sup> So an agent employed to buy or to settle a

lon, 11 R. I. 311, 23 Am. Rep. 458; *Everhart v. Searle*, 71 Pa. 256; *Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 528; *Meyer v. Hanchett*, 39 Wis. 415; *Id.*, 43 Wis. 246; *Atlee v. Fink*, 75 Mo. 100, 42 Am. Rep. 385.

"By engaging with the second, he forfeits his right to compensation from the one who first employed him. By the second engagement, the agent, if he does not in fact disable himself from rendering to the first the full quantum of services contracted for, at least tempts himself not to do so. And for the same reason he cannot recover from the second employer, who is ignorant of the first engagement. And, if the second employer has knowledge of the first engagement, then both he and the agent are guilty of the wrong committed against the first employer, and the law will enforce an executory contract entered into in fraud of the rights of the first employer." *Bell v. McConnell*, supra, per *McIlvaine, J.*

Evidence of custom to charge double commission is inadmissible. *Farnsworth v. Hemmer*, 1 Allen (Mass.) 494, 79 Am. Dec. 756; *Raisin v. Clark*, 41 Md. 158, 20 Am. Rep. 66.

<sup>28</sup> *Rupp v. Sampson*, 16 Gray (Mass.) 398, 77 Am. Dec. 416; *Mullen v. Keetzleb*, 7 Bush (Ky.) 253; *Orton v. Scofield*, 61 Wis. 382, 21 N. W. 261; *Collins v. Fowler*, 8 Mo. App. 588; *Nolte v. Hulbert*, 37 Ohio St. 445; *Ranney v. Donovan*, 78 Mich. 318, 44 N. W. 276; *Nevada Nickel Syndicate v. National Nickel Co.* (C. C.) 96 Fed. 133; *Smith v. Moore*, 134 Mass. 405.

<sup>29</sup> *Lees v. Nuttall*, 1 Russ. & M. 53, 2 Myl. & K. 819; *Jenkins v. Eldredge*, 3 Story, 181, Fed. Cas. No. 7,266; *Baker v. Whiting*, 3 Sumn. (U. S.) 475, Fed. Cas. No. 787; *Parkist v. Alexander*, 1 Johns. Ch. (N. Y.) 394; *Sweet v. Jaccocks*, 6 Paige (N. Y.) 355, 31 Am. Dec. 252; *Torrey v. Bank of Orleans*, 9 Paige (N. Y.) 649; *Church v. Sterling*, 16 Conn. 388; *Matthews v. Light*, 32 Me. 305; *Wellford v. Chancellor*, 5 Grat. (Va.) 39; *Winn v. Dillon*, 27 Miss. 494; *Firestone v. Firestone*, 49 Ala. 128; *Rhea v. Puryear*, 26 Ark. 344; *Barziza v. Story*, 39 Tex. 354; *Vallette v. Tedens*, 122 Ill. 607, 14 N. E. 52, 3 Am. St. Rep. 502; *McKey v. Clark*, 233 Fed. 928, 147 C. C. A. 602; *Seacoast R. Co. v. Wood*, 65 N. J. Eq. 530, 56 Atl. 337; *Edwards v. Dooley*, 120 N. Y. 540, 24 N. E. 827.

<sup>30</sup> *Rose v. Hayden*, 35 Kan. 106, 10 Pac. 554, 57 Am. Rep. 145; *Boswell v. Cunningham*, 32 Fla. 277, 13 South. 354, 21 L. R. A. 54.

claim will not be permitted, if he buys it in his own name, to hold it adversely to his principal, or to recover from him more than he actually paid.<sup>31</sup> Nor may an agent use for his own benefit, and to the detriment of his principal, information obtained in the course of the agency.<sup>32</sup>

### *May Not Make a Profit*

All profits belong to the principal, and must be accounted for.<sup>33</sup> "Where the profits are made by a violation of duty, it would be obviously unjust to allow the agent to reap the fruits of his own misconduct; and, where the profits are made in the ordinary course of the business of the agency, it must be presumed that the parties intended that the principal should have the benefit thereof."<sup>34</sup>

The agent undertakes to work solely in the interest of his principal; in other words, that all benefits accruing from his efforts in and about the premises shall belong to his principal.

### *May not Deny Principal's Title*

The duty of loyalty forbids the agent as a rule to deny the title of his principal, or to set up the adverse title of a third person, to goods or money received by him from his principal or on his account.<sup>35</sup> He

<sup>31</sup> Reed v. Norris, 2 Myl. & C. 361; Smith v. Brotherline, 62 Pa. 461; Noyes v. Landon, 59 Vt. 569, 10 Atl. 342.

<sup>32</sup> Ringo v. Binns, 10 Pet. 269, 9 L. Ed. 420; Case v. Carroll, 35 N. Y. 385; Galbraith v. Elder, 8 Watts (Pa.) 81; Smith v. Brotherline, 62 Pa. 461; Cameron v. Lewis, 56 Miss. 76. See, also, Cragin v. Powell, 128 U. S. 691, 9 Sup. Ct. 203, 32 L. Ed. 566; Carter v. Palmer, 8 Cl. & F. 657; Gower v. Andrew, 59 Cal. 119, 43 Am. Rep. 242; Davis v. Hamlin, 108 Ill. 39, 48 Am. Rep. 541.

Where a business manager secretly copied from his employer's order book a list of names of customers, and after termination of the employment used the list in a similar business on his own account, he was liable in damages to his employer. Robt. v. Green, [1895] 2 Q. B. 1. See, also, Merryweather v. Moore, [1892] 2 Ch. 518; Lamb v. Evans, [1893] 2 Q. B. 1.

<sup>33</sup> Hinchman v. E. I. Co., 1 Ves. Jr. 298; Morrison v. Thompson, L. R. 9 Q. B. 480; Parker v. McKenna, L. R. 10 Ch. 96; Jeffries v. Wiester, 2 Sawy. 135, Fed. Cas. No. 7,254; Northern Pac. R. Co. v. Kindred (C. C.) 14 Fed. 77; Warren v. Burt, 7 C. C. A. 105, 58 Fed. 101; Dutton v. Willner, 52 N. Y. 312; Bain v. Brown, 56 N. Y. 285; Dodd v. Wakeman, 26 N. J. Eq. 484; Sandoval v. Randolph, 222 U. S. 161, 32 Sup. Ct. 48, 56 L. Ed. 142; Essex Trust Co. v. Enwright, 214 Mass. 507, 102 N. E. 441, 47 L. R. A. (N. S.) 567; Reis & Co. v. Volck, 151 App. Div. 613, 136 N. Y. Supp. 367.

<sup>34</sup> Story, Ag. § 207.

<sup>35</sup> Zaluta v. Vinent, 1 DeG., M. & G. 315; Nicholson v. Knowles, 5 Mad. 47; Collins v. Tillou, 26 Conn. 368, 68 Am. Dec. 398; Marvin v. Ellwood, 11 Paige (N. Y.) 365; Murray v. Vanderbilt, 39 Barb. (N. Y.) 140; Hancock v. Gomez, 58 Barb. (N. Y.) 490; Von Hurter v. Spengeman, 17 N. J. Eq. 185; Hungerford v. Moore, 65 Ala. 232; Day v. Southwell, 3 Wis. 657; Witman v. Felton, 28 Mo. 601; Essex Trust Co. v. Enwright, 214 Mass. 507, 102 N. E. 441, 47 L. R. A. (N. S.) 567; Peabody v. Burri, 255 Ill. 592, 99 N. E. 690.

may, however, show that since the receipt of the property the principal has parted with the title,<sup>36</sup> or that he has himself been divested of possession by title paramount.<sup>37</sup>

If an agent has received money on behalf of his principal under an illegal contract, he must account for the money, and cannot set up illegality which the other party has waived;<sup>38</sup> nor, if he has received money from his principal for an illegal purpose, which is executed, can he refuse to refund to the principal on demand.<sup>39</sup>

### *Duty to Give Notice*

It is the duty of the agent to give notice of all facts coming to his knowledge which may make it necessary for the principal to take steps for his security.<sup>40</sup> Thus, if a note taken by an agent in payment for goods sold is not paid at maturity,<sup>41</sup> he must promptly apprise his principal.

<sup>36</sup> *Smith v. Hammond*, 6 Sim. 10; *Marvin v. Ellwood*, 11 Paige (N. Y.) 365; *Duncan v. Spear*, 11 Wend. (N. Y.) 56; *Roberts v. Noyes*, 76 Me. 590; *Snodgrass v. Butler*, 54 Miss. 45.

<sup>37</sup> *Hardman v. Wilcox*, 9 Bing. 382; *Biddle v. Bond*, 6 B. & S. 225; *Hunt v. Maniere*, 11 Jur. (N. S.) 28; *Burton v. Wilkinson*, 18 Vt. 185, 46 Am. Dec. 145; *Robertson v. Woodward*, 3 Rich. (S. C.) 251; *Bliven v. Railroad Co.*, 36 N. Y. 403; *Western Transp. Co. v. Barber*, 56 N. Y. 544.

<sup>38</sup> *Tenant v. Elliott*, 1 B. & P. 3; *Bridger v. Savage*, 15 Q. B. D. 363; *Baldwin v. Potter*, 46 Vt. 402; *Norton v. Blinn*, 39 Ohio St. 145; *Gilliam v. Brown*, 43 Miss. 641; *Brooks v. Martin*, 2 Wall. 70, 17 L. Ed. 732; *Dillman v. Hastings*, 144 U. S. 136, 12 Sup. Ct. 663, 36 L. Ed. 378 (usurious interest); *Snell v. Pells*, 113 Ill. 145. But see *Clark*, Contr. 493, note, and cases cited.

It is otherwise if the principal must found his action on an illegal contract. *Hunt v. Knickerbacker*, 5 Johns. (N. Y.) 326; *Fales v. Mayberry*, 2 Gall. 560, Fed. Cas. No. 4,622; *Lemon v. Grosskopf*, 22 Wis. 447, 99 Am. Dec. 58; *Leonard v. Poole*, 114 N. Y. 371, 21 N. E. 707, 4 L. R. A. 728, 11 Am. St. Rep. 667.

<sup>39</sup> *Souhegan Nat. Bank v. Wallace*, 61 N. H. 24; *Kiewert v. Rindskopf*, 46 Wis. 481, 1 N. W. 163, 32 Am. Rep. 731.

<sup>40</sup> *Harvey v. Turner*, 4 Rawle (Pa.) 223; *Arrott v. Brown*, 6 Whart. (Pa.) 9; *Hall v. Gambrill* (C. C.) 88 Fed. 709, aff. 92 Fed. 32, 34 C. C. A. 190; *Edmonstone v. Hartshorn*, 19 N. Y. 9.

An agent authorized to sell property on specified prices and terms is bound, on learning that a more advantageous sale can be made, to communicate the facts to his principal. *Holmes v. Cathcart*, 88 Minn. 213, 92 N. W. 956, 60 L. R. A. 734, 97 Am. St. Rep. 513. See, also, *Hegenmyer v. Marks*, 37 Minn. 6, 32 N. W. 785, 5 Am. St. Rep. 808.

<sup>41</sup> *Harvey v. Turner*, supra.

## LIEN OF AGENT

23. The agent has a particular lien upon the goods and chattels of the principal lawfully in his possession as agent for what is due him as agent in respect to the property subject to the lien, unless a general lien is conferred by statute or by usage.

*Lien of Agent—Particular or General*

In addition to his personal remedies for the recovery of his remuneration, reimbursement, and indemnity the agent has the right of lien. A lien at common law may be defined as the right to retain possession of a thing until a debt due to the person retaining possession is satisfied. A lien may be particular or general. Where the right is to retain the thing which is the subject of the lien for charges or demands growing out of or connected with that identical thing, the lien is particular, or special. Where the right is to retain the thing not only for charges or demands growing out of or connected with that particular thing, but for a general balance due from the owner, the lien is general. Unless there is an express or implied agreement to the contrary, an agent has a particular lien upon the goods, chattels, and funds of his principal intrusted to him in the course of the agency or rightfully coming into his possession as agent. The lien of the agent is merely a particular lien, unless there is an express agreement for a general lien, or unless an agreement for a general lien is to be implied from a previous course of dealing or other circumstances,<sup>42</sup> or unless he belongs to a class of agents who have a general lien. Thus, an auctioneer has a particular lien upon the goods intrusted to him for sale and upon their proceeds for his commissions and the charges of sale,<sup>43</sup> a broker employed to procure a loan has a particular lien for his commissions upon the proceeds of the loan,<sup>44</sup> but neither has a general lien. On the other hand, factors,<sup>45</sup> insurance brokers,<sup>46</sup> solicitors and attor-

<sup>42</sup> *Bock v. Gorrisson*, 30 L. J. Ch. 39; *McKenzie v. Nevius*, 22 Me. 138, 38 Am. Dec. 291; *Cooper v. Hong Kong & S. Banking Corp.*, 107 N. Y. 282, 14 N. E. 277; *Deering Harvester Co. v. Hamilton*, 80 Minn. 162, 83 N. W. 44.

<sup>43</sup> *Robinson v. Rutter*, 4 El. & B. 954; *Wolfe v. Horne*, 2 Q. B. D. 355.

<sup>44</sup> *Vinton v. Baldwin*, 95 Ind. 433.

An agent who obtains possession from carrier by paying freight has lien for reimbursement. *White v. Sheffield & T. St. Ry. Co.*, 90 Ala. 254, 7 South. 910.

<sup>45</sup> *Story*, Ag. § 376.

<sup>46</sup> *Mann v. Forrester*, 4 Cowp. 60; *Westwood v. Bell*, 4 Camp. 349; *Moody v. Webster*, 3 Pick. (Mass.) 424; *McKenzie v. Nevius*, 22 Me. 138, 38 Am. Dec. 291.

neys,<sup>47</sup> bankers,<sup>48</sup> and some other classes of agents,<sup>49</sup> have a general lien. The general lien of these classes of agents has its origin in the general usage of trade, which has become so fixed that the courts take notice of it without proof. A general lien is sometimes conferred upon certain classes of agents by statute.<sup>50</sup>

*Same—Termination of Lien*

The lien is terminated if the agent voluntarily gives up possession,<sup>51</sup> unless he is induced to do so by fraud<sup>52</sup> or mistake, or possession is obtained from him illegally.<sup>53</sup> But it does not terminate upon the death of the principal,<sup>54</sup> nor does it cease because the debt or obligation is barred by the statute of limitations.<sup>55</sup>

The lien is lost by a wrongful refusal to deliver, as where the agent refuses to deliver under claim of right not based upon his lien.<sup>56</sup>

<sup>47</sup> *McPherson v. Cox*, 96 U. S. 404, 24 L. Ed. 746; *In re Knapp*, 85 N. Y. 284.

<sup>48</sup> *Story*, Ag. § 380.

<sup>49</sup> *Wharfingers. Vaylor v. Mangles*, 1 Esp. 109; *Spears v. Hartley*, 3 Esp. 81. *Packers. In re Witt*, 2 Ch. D. 489.

<sup>50</sup> *Story*, Ag., § 375.

<sup>51</sup> *Sweet v. Pym*, 1 East, 4 (delivery to carrier for principal); *Levy v. Barnard*, 2 Moore, 34; *Rosenbaum v. Hayes*, 8 N. D. 461, 79 N. W. 987; *Welker v. Appleman*, 44 Ind. App. 699, 90 N. E. 35.

<sup>52</sup> *Wallace v. Woodgate*, 1 C. & P. 575, R. & M. 193; *Bigelow v. Heaton*, 6 Hill (N. Y.) 43.

<sup>53</sup> *Dicas v. Stockley*, 7 C. & P. 587.

<sup>54</sup> *Hammond v. Barclay*, 2 East, 227; *Newhall v. Dunlap*, 14 Me. 180, 31 Am. Dec. 45.

<sup>55</sup> *Spears v. Hartley*, 3 Esp. 81; *Re Broomhead*, 16 L. J. Q. B. 355.

<sup>56</sup> *Jones, Liens*, § 1018 et seq.



# ATTORNEY AND CLIENT

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## IN GENERAL—DEFINITION

1. An attorney at law is an officer of a court of record legally qualified to prosecute and defend actions in courts of law on the retainer of clients.<sup>1</sup>

The relation existing between an attorney and his client is usually that of principal and agent. The client is the principal; the attorney is the agent. In its broadest sense, "an attorney is one that is set in the turn, stead, or place of another";<sup>2</sup> the term being synonymous with "agent." Attorneys, in the modern use of the term, are of two sorts: attorneys at law, and attorneys in fact. An attorney in fact is a private attorney authorized by another to act in his place and stead, either for some particular purpose, as to do a particular act, or for the transaction of business in general, not of a legal character.<sup>3</sup> An attorney at law is a public attorney employed by a party in a cause to manage the same for him in the courts. Attorneys at law are officers of the courts in which they practice,<sup>4</sup> and must possess certain legal qualifications. No one not possessing these qualifications is entitled to conduct another's cause in the courts.<sup>5</sup> Attorneys at law, on account of their peculiar knowledge and skill, are frequently employed in the transaction of business not involving litigation, such as

<sup>1</sup> Weeks, *Attys. at Law*, p. 146.      <sup>2</sup> Co. Litt. 513.      <sup>3</sup> Black, *Law Dict.*

<sup>4</sup> *Thomas v. Steele*, 22 Wis. 207; *In re Mosness*, 39 Wis. 509, 20 Am. Rep. 55; *Robinson's Case*, 131 Mass. 376, 41 Am. Rep. 239.

<sup>5</sup> *Cobb v. Judge of Superior Court*, 43 Mich. 289, 5 N. W. 309.

drawing contracts, deeds, wills, etc., managing property, and the like. Any person of competent skill, however, although not an attorney at law, may transact such business. In England persons engaged in the practice of law are divided into several classes, under the names of attorneys, solicitors, proctors, counselors, barristers, and advocates. Each class performs different functions. For example, attorneys and solicitors prepare the causes for trial, but cannot try them. This is done by the barristers. These distinctions do not prevail in the United States. Attorneys at law perform all the duties and have all the powers of all classes of legal practitioners in England. For convenience, the term "attorney" will be used as meaning attorneys at law in the broad sense here indicated.

#### *Who Authorized to Practice*

"The bar is no unimportant part of the court, and its members are officers of the court," and therefore in some sense officers of the state for which the court acts.<sup>6</sup> Accordingly, no one is entitled to practice in the courts of a state who has not been duly admitted according to the *lex fori*.<sup>7</sup> In other respects, the general principles of agency apply.

### ESTABLISHMENT OF RELATION

2. The relation of attorney and client may be established in any of the ways in which any other relation of agency may be established. The act of a client by which he engages an attorney to manage his cause is called "retainer."

"It is said that two things are necessary to establish the relation between attorney and client: (1) The agreement of the attorney to be attorney for the party, and (2) the agreement of the party to have the other for an attorney."<sup>8</sup> In civil cases, an attorney cannot be compelled to act for a party against his will. An attorney has no

<sup>6</sup> *In re Mosness*, 39 Wis. 509, 20 Am. Rep. 55; *Sperry v. Reynolds*, 65 N. Y. 179.

<sup>7</sup> *Whart. Ag.* 557; *Robb v. Smith*, 3 Scam. (Ill.) 46; *State v. Garesche*, 36 Mo. 256; *McKoan v. Devries*, 3 Barb. (N. Y.) 196. Circuit Judge not entitled to practice. *Hobby v. Smith*, 1 Cow. (N. Y.) 588; *Seymour v. Ellison*, 2 Cow. (N. Y.) 13.

<sup>8</sup> *Weeks, Attys. at Law*, p. 388; *Lawall v. Groman*, 180 Pa. 532, 37 Atl. 98, 57 Am. St. Rep. 662.

The relation of attorney and client cannot exist between an attorney at law employed by a corporation to practice law for it and a client of the corporation, as there would be neither contract nor privity between the attorney and the client. *In re Co-operative Law Co.*, 198 N. Y. 479, 92 N. E. 15, 32 L. R. A. (N. S.) 55, 139 Am. St. Rep. 839, 19 Ann. Cas. 879.

power to appear and act by virtue of his license alone. He must be employed by the party for whom he appears, or by some one authorized to represent such party.<sup>9</sup> The act of employing an attorney is called "retainer." Formerly attorneys were required to be appointed by warrant, and to file their powers in court;<sup>10</sup> but that practice has long since been disused, and a mere parol retainer is sufficient.<sup>11</sup> The retainer of an attorney may be implied, as where the general attorney of a party appears for him in a particular case, with his knowledge and without objection.<sup>12</sup> So an unauthorized appearance by an attorney may be ratified,<sup>13</sup> or the party may be estopped to deny the authority. Where a duly licensed attorney assumes to appear for a party, his authority to do so is prima facie presumed.<sup>14</sup> Such authority, however, may be questioned either by the alleged client or the opposite party, and the presumption rebutted.

*Questioning Attorney's Authority—By Opposite Party*

When the opposite party questions the authority of the attorney he must state facts tending to show, or the grounds and reasons which

<sup>9</sup> *McAlexander v. Wright*, 3 T. B. Mon. (Ky.) 189, 16 Am. Dec. 93. An attorney prosecuting a suit on a champertous contract cannot surrender the contract and proceed with the suit in the client's absence, though he be also her attorney in fact under a power. *Kelly v. Kelly*, 86 Wis. 170, 56 N. W. 637.

<sup>10</sup> *Manchester Bank v. Fellows*, 28 N. H. 302; *McAlexander v. Wright*, 3 T. B. Mon. (Ky.) 189, 16 Am. Dec. 93.

<sup>11</sup> *Manchester Bank v. Fellows*, 28 N. H. 302; *Weeks, Attys. at Law*, § 185; *Owen v. Ord*, 3 Car. & P. 349; *Hirshfield v. Landman*, 3 E. D. Smith (N. Y.) 208; *Hardin v. Ho-yo-po-nubby's Lessee*, 27 Miss. 567; *Leslie v. Fischer*, 62 Ill. 118; *Sheehan v. Erbe*, 103 App. Div. 7, 92 N. Y. Supp. 862.

<sup>12</sup> *Cooper v. Hamilton*, 52 Ill. 119; *Tabram v. Horn*, 1 Man. & R. 228; *Hall v. Laver*, 1 Hare, 571; *Lee v. Jones*, 2 Camp. 496; *Reynolds v. Howell*, L. R. 8 Q. B. 398.

The verification of a complaint by plaintiff is sufficient written recognition. *Graham v. Andrews*, 11 Misc. Rep. 649, 32 N. Y. Supp. 795.

<sup>13</sup> Payment to the attorney for services rendered is a ratification. *Ryan v. Doyle*, 31 Iowa, 53. See *Olmstead v. Firth*, 60 Minn. 126, 61 N. W. 1017; *Streeten v. Robinson*, 102 Cal. 542, 36 Pac. 946; *Newton v. Hamden*, 79 Conn. 237, 64 Atl. 229; *Gray v. Richmond Bicycle Co.*, 167 N. Y. 348, 60 N. E. 663, 82 Am. St. Rep. 720.

<sup>14</sup> *Hamilton v. Wright*, 37 N. Y. 502; *Denton v. Noyes*, 6 Johns. (N. Y.) 298, 5 Am. Dec. 237; *Arnold v. Nye*, 23 Mich. 296; *Norberg v. Heineman*, 59 Mich. 210, 26 N. W. 481; *Leslie v. Fischer*, 62 Ill. 118; *Ferriss v. Commercial Nat. Bank of Chicago*, 55 Ill. App. 218; *Schlitz v. Meyer*, 61 Wis. 418, 21 N. W. 243; *Piggott v. Addicks*, 3 G. Greene (Iowa) 427, 56 Am. Dec. 547; *Harshey v. Blackmarr*, 20 Iowa, 161, 89 Am. Dec. 520; *Dorsey v. Kyle*, 30 Md. 512, 96 Am. Dec. 617; *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. Ed. 204; *Noyes v. Belding*, 5 S. D. 603, 59 N. W. 1069; *De Montague v. Bacharach*, 187 Mass. 128, 72 N. E. 938; *Cutting v. Jessmer*, 101 App. Div. 283, 91 N. Y. Supp. 658.

induced him to believe, that the attorney had no authority to appear.<sup>15</sup> When the want of authority to bring a suit is shown, the action should be dismissed, on motion of defendant.<sup>16</sup> The question should be raised at the earliest opportunity.<sup>17</sup>

*Same—By Alleged Client*

Not only may the opposite party question an attorney's authority, but his alleged client may do so; and upon his application the proceeding will be stayed or vacated.<sup>18</sup> Laches or acquiescence will estop the party to deny the attorney's authority.<sup>19</sup> It has been held, however, that a judgment cannot be collaterally attacked on the ground that the attorney's appearance on which it was entered was unauthorized, because the record is conclusively presumed to be correct.<sup>20</sup> A distinction in this regard has been often made between foreign and domestic judgments. The rule is well settled in regard to foreign

<sup>15</sup> *People v. Mariposa Co.*, 39 Cal. 683; *Norberg v. Heineman*, 59 Mich. 210, 26 N. W. 481; *Hamilton v. Wright*, 37 N. Y. 502; *Leslie v. Fischer*, 62 Ill. 118; *Keith v. Wilson*, 6 Mo. 435, 35 Am. Dec. 443; *McAlexander v. Wright*, 3 T. B. Mon. (Ky.) 189, 16 Am. Dec. 93; *Thomas v. Steele*, 22 Wis. 207; *Schlitz v. Meyer*, 61 Wis. 418, 21 N. W. 243. Objection should be made by motion before trial. *People v. Lamb*, 85 Hun, 171, 32 N. Y. Supp. 584; *Mutual Life Insurance Co. v. Pinner*, 43 N. J. Eq. 52, 10 Atl. 184.

<sup>16</sup> *Frye's Adm'rs v. Calhoun County*, 14 Ill. 132.

An order on the attorney to produce his authority acts as a stay of proceedings. *Meyer v. Littell*, 2 Pa. 177.

<sup>17</sup> *Reed v. Curry*, 35 Ill. 536. See *Morgan v. Thorne*, 7 Mees. & W. 400. Cannot be raised for the first time an appeal. *State v. Carothers*, 1 G. Greene (Iowa) 465; *People v. Lamb*, 85 Hun, 171, 32 N. Y. Supp. 584; *McIlhenny v. Binz*, 80 Tex. 1, 13 S. W. 655, 26 Am. St. Rep. 705.

<sup>18</sup> *Harshey v. Blackmarr*, 20 Iowa, 161, 89 Am. Dec. 520; *De Louis v. Meek*, 2 G. Greene (Iowa) 55, 50 Am. Dec. 491; *Hefferman v. Burt*, 7 Iowa, 321, 71 Am. Dec. 445; *Sherrard v. Nevius*, 2 Ind. 241, 52 Am. Dec. 508; *Vilas v. Plattsburgh & M. Railroad Co.*, 123 N. Y. 440, 25 N. E. 941, 9 L. R. A. 844, 20 Am. St. Rep. 771. It has, however, been held that a party is bound by a judgment upon an unauthorized appearance; his remedy being to sue the attorney. *Abbott v. Dutton*, 44 Vt. 546, 8 Am. Rep. 394; *England v. Garner*, 90 N. C. 197; *Dorsey v. Kyle*, 30 Md. 512, 96 Am. Dec. 617; *Bunton v. Lyford*, 37 N. H. 512, 75 Am. Dec. 144; *Latuch v. Pasherante*, 1 Salk. 86.

<sup>19</sup> *Dorsey v. Kyle*, 30 Md. 512, 96 Am. Dec. 617.

<sup>20</sup> *Brown v. Nichols*, 42 N. Y. 26; *Hamilton v. Wright*, 37 N. Y. 502; *Hoffmire v. Hoffmire*, 3 Edw. Ch. (N. Y.) 174; *American Ins. Co. v. Oakley*, 9 Paige (N. Y.) 496, 38 Am. Dec. 561; *Finneran v. Leonard*, 7 Allen (Mass.) 54, 83 Am. Dec. 665; *Lowe v. Stringham*, 14 Wis. 222; *Baker v. Stonebraker*, 34 Mo. 175; *Carpentier v. City of Oakland*, 30 Cal. 439; *Field v. Gibbs*, Pet. C. C. 155, Fed. Cas. No. 4,766. Contra, *Wiley v. Pratt*, 23 Ind. 628; *Hess v. Cole*, 23 N. J. Law, 125; *Shumway v. Stillman*, 6 Wend. (N. Y.) 453; *Shelton v. Tiffin*, 6 How. 163, 12 L. Ed. 387. See *Wright v. Andrews*, 130 Mass. 149.

But it appears now to be the rule in New York that any judgment, domestic or foreign, may be attacked collaterally for want of jurisdiction. *Matter of McGarren's Estate*, 112 App. Div. 503, 98 N. Y. Supp. 415.

judgments that the record is only prima facie evidence that the attorney was authorized to appear, and the party is at full liberty to prove that such appearance was unauthorized or fraudulent, and consequently that there was no jurisdiction of his person.<sup>21</sup> A contrary rule has been applied in some states to actions on domestic judgments.<sup>22</sup> But the better opinion is that no valid distinction can be drawn, and that want of jurisdiction because of want of authority on the part of the attorney to appear may always be set up against the judgment, whether foreign or domestic, and proved by extrinsic evidence.<sup>23</sup>

<sup>21</sup> Aldrich v. Kinney, 4 Conn. 380, 10 Am. Dec. 151; Hall v. Williams, 6 Pick. (Mass.) 232, 17 Am. Dec. 356; Shumway v. Stillman, 6 Wend. (N. Y.) 447; Ward v. Price, 25 N. J. Law, 225; Koonce v. Butler, 84 N. C. 221; Sherrard v. Nevius, 2 Ind. 241, 52 Am. Dec. 508; Boylan v. Whitney, 3 Ind. 140; Welch v. Sykes, 3 Gilman (Ill.) 197, 44 Am. Dec. 689; Thompson v. Emmert, 15 Ill. 416; Lawrence v. Jarvis, 32 Ill. 304; Baltzell v. Nosler, 1 Iowa, 588, 63 Am. Dec. 466; Harshey v. Blackmarr, 20 Iowa, 172, 89 Am. Dec. 520; Marx v. Fore, 51 Mo. 69, 11 Am. Rep. 432; Eager v. Stover, 59 Mo. 87; Ferguson v. Crawford, 70 N. Y. 253, 26 Am. Rep. 589; Gilman v. Gilman, 126 Mass. 26, 30 Am. Rep. 646.

Some of the earlier cases are contra. Field v. Gibbs, Pet. C. C. 155, Fed. Cas. No. 4,766; Roberts v. Caldwell, 5 Dana (Ky.) 512; Edmonds v. Montgomery, 1 Iowa, 143. This was also the doctrine in Missouri (see Warren v. Lusk, 16 Mo. 102; Baker v. Stonebraker, 34 Mo. 172) until the decision in the case of Thompson v. Whitman, 18 Wall. 457, 21 L. Ed. 897, after which the courts felt obliged to conform to the principles therein established. See Eager v. Stover, 59 Mo. 87.

<sup>22</sup> Everett v. Warner Bank, 58 N. H. 340; Field v. Gibbs, Pet. C. C. 155, Fed. Cas. No. 4,766; Pillsbury's Lessee v. Dugan's Adm'r, 9 Ohio, 117, 34 Am. Dec. 427. See Corbitt v. Timmerman, 95 Mich. 581, 55 N. W. 437, 35 Am. St. Rep. 586; Hendrick v. Whittemore, 105 Mass. 23.

<sup>23</sup> Reynolds v. Fleming, 30 Kan. 106, 1 Pac. 61, 46 Am. Rep. 86; Ferguson v. Crawford, 70 N. Y. 253, 26 Am. Rep. 589; Matter of McGarren's Estate supra; Baker v. O'Riordan, 65 Cal. 368, 4 Pac. 232. See Hess v. Cole, 23 N. J. Law, 116; Cassidy v. Automatic Time Stamp Co., 185 Ill. 431, 56 N. E. 1116.

## GENERAL POWERS OF AN ATTORNEY

3. An attorney at law has authority, by virtue of his employment as such, to do in behalf of his client all acts, in or out of court, necessary or incidental to the prosecution and management of the suit, and which affect the remedy only, and not the cause of action.<sup>24</sup>
4. More specifically, by reason of his general authority, an attorney has the following powers, *inter alia*:
  - (a) He has general control over conduct of suit; but,
  - (b) He cannot compromise his client's claim.
  - (c) He may receive payment, even after judgment.
  - (d) He may enforce judgment by the usual means.
  - (e) He may employ subordinates, but not substitutes.
  - (f) He may bind his client by bonds and undertakings in cases of strict necessity.

An attorney, like any other agent, may bind his principal by acts within the course of his employment. He is employed to conduct and manage a cause; that is, to secure the remedy, not to discharge the cause of action. This is the fundamental principle by which to determine what acts of an attorney are binding upon his client.<sup>25</sup> Acts in or out of court, incidental or necessary to the due prosecution of the remedy, are *prima facie* within the attorney's authority,<sup>26</sup> and are binding upon the client as against innocent third persons.<sup>27</sup> Private instructions limiting an attorney's actual authority are of no avail, as against third persons having no knowledge or notice of such limitations.<sup>28</sup>

### *Control of Suit—Implied Powers*

An attorney has full control of a case in court.<sup>29</sup> In the absence of collusion, a client is bound by whatever his attorney does affecting

<sup>24</sup> *Moulton v. Bowker*, 115 Mass. 36, 15 Am. Rep. 72.

<sup>25</sup> Attorney cannot bind client by sale of land sued for. *Corbin v. Muligan*, 1 Bush (Ky.) 297. Nor by purchase of land for client at sale under client's execution. *Beardsley v. Root*, 11 Johns. (N. Y.) 464, 6 Am. Dec. 386.

<sup>26</sup> The attorney and not the client has exclusive management of the cause in court. *Board of Com'rs of Funded Debt of City of San José v. Younger*, 29 Cal. 147, 87 Am. Dec. 164.

<sup>27</sup> *Foster v. Wiley*, 27 Mich. 244, 15 Am. Rep. 185; *Clark v. Randall*, 9 Wis. 135; *Moulton v. Bowker*, 115 Mass. 36, 15 Am. Rep. 72; *Wieland v. White*, 109 Mass. 392; *De Louis v. Meek*, 2 G. Greene (Iowa) 55, 50 Am. Dec. 491.

<sup>28</sup> Payment to an attorney of record discharges the debt in spite of private instructions limiting attorney's authority. *State, to Use of Bank of Missouri, v. Hawkins*, 28 Mo. 366; *Pickett v. Bates*, 3 La. Ann. 627.

<sup>29</sup> *Whart. Ag. § 585*; *Nightingale v. Oregon Cent. Railway Co.*, 2 Sawy. 339, Fed. Cas. No. 10,264; *Ward v. Hollins*, 14 Md. 158; *Clark v. Randall*,

the remedy only. If it be done without actual authority, the only remedy is against the attorney.<sup>30</sup> "It is indispensable to the decorum of the court, and the due and orderly conduct of a cause, that such attorney shall have the management and control of the action, and his acts go unquestioned by any one except the party whom he represents. So long as he remains attorney of record, the court cannot recognize any other as having the management of the cause."<sup>31</sup> An attorney's general control over the conduct of a suit has been held to include the power to make stipulations regarding the conduct of the trial;<sup>32</sup> to waive objections to evidence;<sup>33</sup> to admit facts;<sup>34</sup> to waive technical advantages;<sup>35</sup> to waive notices;<sup>36</sup> to open defaults and vacate the judgment;<sup>37</sup> to verify papers by affidavit,<sup>38</sup> or waive verification;<sup>39</sup> to stipulate for continuances;<sup>40</sup> to extend the time for filing papers and pleadings;<sup>41</sup> to charge client with cost of printing briefs;<sup>42</sup> to remit damages;<sup>43</sup> to agree to a reference;<sup>44</sup> to submit

9 Wis. 135, 76 Am. Dec. 252; *Pierce v. Strickland*, 2 Story, 292, Fed. Cas. No. 11,147; *Simpson v. Lombas*, 14 La. Ann. 103.

<sup>30</sup> *Moulton v. Bowker*, 115 Mass. 36, 15 Am. Rep. 72; *Gaillard v. Smart*, 6 Cow. (N. Y.) 385; *Kellogg v. Gilbert*, 10 Johns. (N. Y.) 220, 6 Am. Dec. 335; *Anon.*, 1 Wend. (N. Y.) 108.

<sup>31</sup> *Foster v. Wiley*, 27 Mich. 244, 15 Am. Rep. 185; *Sampson v. Ohleyer*, 22 Cal. 200; *African Methodist Bethel Church of City of Baltimore v. Carmack*, 2 Md. Ch. 143; *Greenlee v. McDowell*, 39 N. C. 481; *Chambers v. Hodges*, 23 Tex. 104.

<sup>32</sup> *Board of Com'rs of Funded Debt of City of San José v. Younger*, 29 Cal. 147, 87 Am. Dec. 164; *Tewis v. Palatine Ins. Co. of London, Eng.* (C. C.) 149 Fed. 560; *Montrose v. Baggott*, 161 App. Div. 494, 146 N. Y. Supp. 649.

<sup>33</sup> *Town of Alton v. Town of Gilmanton*, 2 N. H. 520.

<sup>34</sup> *Lewis v. Sumner*, 13 Metc. (Mass.) 269; *Farmers' Bank of Maryland v. Sprigg*, 11 Md. 389; *Treadway v. Sioux City & St. P. Railroad Co.*, 40 Iowa, 526; *Starke v. Kenan*, 11 Ala. 819; *Talbot v. McGee*, 4 T. B. Mon. (Ky.) 375; *Young v. Wright*, 1 Camp. 140; *Smith's Heirs v. Dixon*, 3 Metc. (Ky.) 438; *Wenans v. Lindsey*, 1 How. (Miss.) 577.

<sup>35</sup> *Town of Alton v. Town of Gilmanton*, 2 N. H. 520; *Hanson v. Hoitt*, 14 N. H. 56; *Hart v. Spalding*, 1 Cal. 213.

<sup>36</sup> *Hefferman v. Burt*, 7 Iowa, 320, 71 Am. Dec. 445; *Town of Alton v. Town of Gilmanton*, 2 N. H. 520.

<sup>37</sup> *Read v. French*, 28 N. Y. 293.

<sup>38</sup> *Wright v. Parks*, 10 Iowa, 342; *Bates v. Pike*, 9 Wis. 224. He may make necessary affidavits, when facts are within his own knowledge. *Simpson v. Lombas*, 14 La. Ann. 103; *Austin v. Latham*, 19 La. 88; *Manley v. Headley*, 10 Kan. 88; *Willis v. Lyman*, 22 Tex. 268.

<sup>39</sup> *Smith v. Mulliken*, 2 Minn. 319, 322 (Gil. 273).

<sup>40</sup> *Shaw v. Kidder*, 2 How. Prac. (N. Y.) 244.

<sup>41</sup> *Hefferman v. Burt*, 7 Iowa, 320, 71 Am. Dec. 445.

<sup>42</sup> *Williamson-Stewart Paper Co. v. Bosbyshell*, 14 Mo. App. 534.

<sup>43</sup> *Lamb v. Williams*, 1 Salk. 89.

<sup>44</sup> *Tiffany v. Lord*, 40 How. Prac. (N. Y.) 481; *Stokely v. Robinson*, 34 Pa. 315; *Wade v. Powell*, 31 Ga. 1.

the cause to arbitration;<sup>45</sup> to dismiss the cause;<sup>46</sup> to agree that execution shall be suspended after judgment;<sup>47</sup> and the like.<sup>48</sup> It has been held that an attorney has no implied power to assign the suit;<sup>49</sup> to release indorsers;<sup>50</sup> to release the interest of witnesses;<sup>51</sup> to enter a retraxit, when it is a final bar;<sup>52</sup> to agree not to appeal or

<sup>45</sup> *Connett v. City of Chicago*, 114 Ill. 233, 29 N. E. 280; *Tilton v. United States Life Insurance Co.*, 8 Daly (N. Y.) 84; *Town of Alton v. Town of Gilmanton*, 2 N. H. 520. Contra, *McPherson v. Cox*, 86 N. Y. 472; *Sargeant v. Clark*, 108 Pa. 588; *Haskell v. Whitney*, 12 Mass. 47; *Buckland v. Conway*, 16 Mass. 396; *Jenkins v. Gillespie*, 10 Smedes & M. (Miss.) 31, 48 Am. Dec. 732.

<sup>46</sup> *Gaillard v. Smart*, 6 Cow. (N. Y.) 385; *Barrett v. Third Ave. Railroad Co.*, 45 N. Y. 628; *McLeran v. McNamara*, 55 Cal. 508; *Davis v. Hall*, 90 Mo. 659, 3 S. W. 382; *Rogers v. Greenwood*, 14 Minn. 333 (Gil. 256).

<sup>47</sup> *Wieland v. White*, 109 Mass. 392; *Union Bank of Georgetown v. Geary*, 5 Pet. 99, 8 L. Ed. 30.

<sup>48</sup> Attorney has power to accept service, *Hefferman v. Burt*, 7 Iowa, 320, 71 Am. Dec. 445, to appeal from the decision, *Adams v. Robinson*, 1 Pick. (Mass.) 462; to release an attachment, *Moulton v. Bowker*, 115 Mass. 36, 15 Am. Rep. 72; to confess judgment, *Denton v. Noyes*, 6 Johns. (N. Y.) 296, 5 Am. Dec. 237. See *Thompson v. Pershing*, 80 Ind. 303; *Talbot v. McGee*, 4 T. B. Mon. (Ky.) 377. But see *People ex rel. Wright v. Lamborn*, 1 Scam. (Ill.) 123. It is within the scope of an attorney's authority to agree that, if a foreclosure sale is effected pending an appeal from the foreclosure decree, the proceeds shall be held in court, subject to be disposed of pursuant to the decision and mandate of the appellate court. *Halliday v. Stuart*, 151 U. S. 229, 14 Sup. Ct. 302, 38 L. Ed. 141. As to power to issue writs outside of county, where admitted, see *Hooven Mercantile Co. v. Morgan*, 15 Pa. Co. Ct. R. 567; *Id.*, 4 Pa. Dist. R. 48. As to power to levy on property, and liability of client therefor, see *Graham v. Reno*, 5 Colo. App. 330, 38 Pac. 835; *Wiegmann v. Morimura*, 12 Misc. Rep. 37, 33 N. Y. Supp. 39; *Fischer v. Hetherington*, 11 Misc. Rep. 575, 32 N. Y. Supp. 795. As to power to make stipulation, see *Beardsley v. Poke*, 11 Misc. Rep. 117, 32 N. Y. Supp. 926; *Smith v. Barnes*, 9 Misc. Rep. 368, 29 N. Y. Supp. 692; *Ives v. Ives*, 80 Hun, 136, 29 N. Y. Supp. 1053. Admission of service, *Sullivan v. Susong*, 40 S. C. 154, 18 S. E. 268.

<sup>49</sup> *Weathers v. Ray*, 4 Dana (Ky.) 474; *Head v. Gervais*, Walk. (Miss.) 431, 12 Am. Dec. 577; *Mayer v. Blease*, 4 S. C. 10. An attorney to whom a note is sent for collection has no authority to indorse the same in the name of his client. *Sherrill v. Weisiger Clothing Co.*, 114 N. C. 436, 19 S. E. 365.

<sup>50</sup> *Varnum v. Bellamy*, 4 McLean, 87, Fed. Cas. No. 16,886; *Kellogg v. Gilbert*, 10 Johns. (N. Y.) 220, 6 Am. Dec. 335; *East River Bank v. Kennedy*, 9 Bosw. (N. Y.) 543; *York Bank v. Appleton*, 17 Me. 55; *Mitchell v. Cotten*, 3 Fla. 134. Or release a surety. *Union Bank of Tennessee v. Govan*, 10 Smedes & M. (Miss.) 333; *Savings Institution of Harrodsburg v. Chinn's Adm'r*, 7 Bush (Ky.) 539; *Givens v. Briscoe*, 3 J. J. Marsh. (Ky.) 529.

<sup>51</sup> *East River Bank v. Kennedy*, 9 Bosw. (N. Y.) 543; *Murray v. House*, 11 Johns. (N. Y.) 464; *Bovne v. Hyde*, 6 Barb. (N. Y.) 392; *Ball v. Bank of State*, 8 Ala. 590, 42 Am. Dec. 649; *Shores v. Caswell*, 13 Metc. (Mass.) 413; *Marshall v. Nagel*, 1 Bailey (S. C.) 308.

<sup>52</sup> *Lambert v. Sandford*, 2 Blackf. (Ind.) 137, 18 Am. Dec. 149.



move for a new trial;<sup>53</sup> though he may gratuitously stipulate in advance that a trial shall be final.<sup>54</sup>

*Power to Compromise Claim*

In England it seems to be settled that general authority to conduct a cause gives the attorney power to compromise.<sup>55</sup> The compromise is binding on the client, though against his express instructions, provided this limitation on the attorney's authority was unknown to the opposite party.<sup>56</sup> This rule is followed in some American decisions,<sup>57</sup> but by the weight of authority in America attorneys have no implied power to compromise their client's claims.<sup>58</sup> A compromise may be ratified by acquiescence.<sup>59</sup>

<sup>53</sup> *People v. Mayor, etc.*, 11 Abb. Prac. (N. Y.) 66. *Contra*, *Pike v. Emerson*, 5 N. H. 393, 22 Am. Dec. 468. Attorney cannot release garnishee from attachment, *Quarles v. Porter*, 12 Mo. 76; nor agree that dismissal of an action shall bar a subsequent action for malicious prosecution, *Marbourg v. Smith*, 11 Kan. 554; nor to release his client's cause of action, *Wadhams v. Gay*, 73 Ill. 415; *Mandeville v. Reynolds*, 68 N. Y. 528; nor release property from the lien of a judgment, *Horsev. Chew*, 65 Md. 555, 5 Atl. 466; *Phillips v. Dobbins*, 56 Ga. 617; or from the levy of an execution, *Banks v. Evans*, 10 Smedes & M. (Miss.) 35, 48 Am. Dec. 734; *Benedict v. Smith*, 10 Paige (N. Y.) 126.

<sup>54</sup> *Smith v. Barnes*, 9 Misc. Rep. 368, 29 N. Y. Supp. 692; *Sargeant v. Clark*, 108 Pa. 588.

<sup>55</sup> *Swinfen v. Swinfen*, 18 C. B. 485, 1 C. B. (N. S.) 364, 2 De Gex & J. 381; *Swinfen v. Swinfen*, 5 Hurl. & N. 890; *Prestwich v. Poley*, 18 C. B. (N. S.) 806; *Strauss v. Francis*, 12 Jur. (N. S.) 486.

<sup>56</sup> *Potter v. Parsons*, 14 Iowa, 286.

<sup>57</sup> *Mallory v. Mariner*, 15 Wis. 172; *Wieland v. White*, 109 Mass. 392; *Peru Steel & Iron Co. v. Whipple File & Steel Manuf'g Co.*, 109 Mass. 464; *Potter v. Parsons*, 14 Iowa, 286; *North Missouri R. Co. v. Stephens*, 36 Mo. 150, 88 Am. Dec. 138; *Holker v. Parker*, 7 Cranch, 436, 3 L. Ed. 396; *Gordon v. Coolidge*, 1 Sumn. 537, Fed. Cas. No. 5,606; *Beliveau v. Amoskeag Mfg. Co.*, 68 N. H. 225, 40 Atl. 734, 44 L. R. A. 167, 73 Am. St. Rep. 577. In Massachusetts it is an open question. 6 C. J. 659. See *Brewer v. Casey*, 196 Mass. 384, 82 N. E. 45.

<sup>58</sup> *Mandeville v. Reynolds*, 68 N. Y. 528; *Wetherbee v. Fitch*, 117 Ill. 67, 7 N. E. 513; *Wadhams v. Gay*, 73 Ill. 415; *Kelly v. Wright*, 65 Wis. 236, 26 N. W. 610; *Fritchey v. Bosley*, 56 Md. 96; *Whipple v. Whitman*, 13 R. I. 512, 43 Am. Rep. 42; *Granger v. Batchelder*, 54 Vt. 248, 41 Am. Rep. 846; *Spears v. Ledergerber*, 56 Mo. 465; *Isaacs v. Zugsmith*, 103 Pa. 77; *Filby v. Miller*, 25 Pa. 264; *Township of North Whitehall v. Keller*, 100 Pa. 105, 45 Am. Rep. 361. See *Holker v. Parker*, 7 Cranch, 436, 3 L. Ed. 396. Generally, as to the release and compromise of claims, see *Senn v. Joseph*, 106 Ala. 454, 17 South. 543; *Barton v. Hunter*, 59 Mo. App. 610; *Maxwell v. Pate* (Miss.) 16 South. 529; *Mygatt v. Tarbell*, 85 Wis. 457, 55 N. W. 1031; *Armstrong v. Hurst*, 39

<sup>59</sup> *Mayer v. Foulkrod*, 4 Wash. C. C. 511, Fed. Cas. No. 9,342; *Danziger v. Pittsfield Shoe Co.*, 204 Ill. 145, 68 N. E. 534; *Bryant v. Rich's Grill*, 216 Mass. 344, 103 N. E. 925, Ann. Cas. 1915B, 869; *Equitable Trust Co. v. MacLaire*, 77 Misc. Rep. 116, 135 N. Y. Supp. 1022.

*Power to Receive Payment*

An attorney has implied power to receive payment on behalf of his client, either before or after judgment.<sup>60</sup> But, in the absence of express authority, he has no right to accept anything but money.<sup>61</sup> Confederate money, bonds, notes, or other property, though accepted by the attorney, are not payment to the client.<sup>62</sup> He may receive partial payments,<sup>63</sup> but cannot discharge the debtor except upon full payment.<sup>64</sup> Authority to receive payment is not authority to sell or assign the claim.<sup>65</sup> Payment to an attorney without notice of the revocation of his authority is payment to the client.<sup>66</sup> Where money is due on a written security, and such security is not in possession of the attorney, its absence is prima facie notice that he has no authority to receive payment.<sup>67</sup>

S. C. 498, 18 S. E. 150; *Miocene Ditch Co. v. Moore*, 150 Fed. 483, 80 C. C. A. 301; *Schroeder v. Wolf*, 227 Ill. 133, 81 N. E. 13; *Trenton St. R. Co. v. Lawler*, 74 N. J. Eq. 828, 71 Atl. 234, 74 Atl. 668; *Lewis v. Duane*, 141 N. Y. 302, 36 N. E. 322.

<sup>60</sup> *Hudson v. Johnson*, 1 Wash. (Va.) 10; *Carroll County v. Cheatham*, 48 Mo. 385; *Powel v. Little*, 1 W. Bl. 8; *Vorley v. Garrad*, 2 Dowl. 490; *Yates v. Freckleton*, 2 Doug. 623; *Ducett v. Cunningham*, 39 Me. 386; *Langdon v. Potter*, 13 Mass. 320; *Miller v. Scott*, 21 Ark. 396; *Smyth v. Harvie*, 31 Ill. 62, 83 Am. Dec. 202; *Wycoff v. Bergen*, 1 N. J. Law, 214; *White v. Johnson*, 67 Me. 287; *Hough v. First Nat. Bank of Oelwein*, 173 Iowa, 48, 155 N. W. 163; *Faughnan v. City of Elizabeth*, 58 N. J. Law, 309, 33 Atl. 212; *Matter of Amsterdam Ave.*, 112 App. Div. 160, 98 N. Y. Supp. 331; *Stratton v. Graham*, 164 App. Div. 348, 149 N. Y. Supp. 662.

<sup>61</sup> *Walker v. Scott*, 13 Ark. 644; *Gullett v. Lewis*, 3 Stew. (Ala.) 23; *Cost v. Genette*, 1 Port. (Ala.) 212; *Huston v. Mitchell*, 14 Serg. & R. (Pa.) 307, 16 Am. Dec. 506; *Lord v. Burbank*, 18 Me. 178; *Treasurers v. McDowell*, 1 Hill (S. C.) 184, 26 Am. Dec. 166; *Garvin v. Lowry*, 7 Smedes & M. (Miss.) 24; *Jeter v. Haviland*, 24 Ga. 252. But see *Livingston v. Radcliff*, 6 Barb. (N. Y.) 201.

<sup>62</sup> *Trumbull v. Nicholson*, 27 Ill. 149; *Davis v. Lee*, 20 La. Ann. 248; *West v. Ball*, 12 Ala. 340; *Chapman v. Cowles*, 41 Ala. 103, 91 Am. Dec. 508; *Harper v. Harvey*, 4 W. Va. 539; *Kirk's Appeal*, 87 Pa. 243, 30 Am. Rep. 357; *Stackhouse v. O'Hara's Ex'rs*, 14 Pa. 88; *Herriman v. Shomon*, 24 Kan. 387, 36 Am. Rep. 261; *Fassitt v. Middleton*, 47 Pa. 214, 86 Am. Dec. 535; *Miller v. Lane*, 13 Ill. App. 648; *Smock v. Dade*, 5 Rand. (Va.) 639, 16 Am. Dec. 780; *Jeter v. Haviland*, 24 Ga. 252; *Langdon v. Potter*, 13 Mass. 319; *Moye v. Cogdell*, 69 N. C. 93.

<sup>63</sup> *Ducett v. Cunningham*, 39 Me. 386; *Brackett v. Norton*, 4 Conn. 517, 10 Am. Dec. 179; *Miller v. Scott*, 21 Ark. 396; *Pickett v. Bates*, 3 La. Ann. 627; *Rogers v. McKenzie*, 81 N. C. 164.

<sup>64</sup> *Mechem, Ag. (2d Ed.)* § 2180.

<sup>65</sup> *Herriman v. Shomon*, 24 Kan. 387, 36 Am. Rep. 261; *Miller v. Lane*, 13 Ill. App. 648; *Mechem, Ag. (2d Ed.)* § 2153.

<sup>66</sup> *Weist v. Lee*, 3 Yeates (Pa.) 47.

<sup>67</sup> *Smith v. Kidd*, 68 N. Y. 130, 23 Am. Rep. 157; *Doubleday v. Kress*, 50 N. Y. 410, 10 Am. Rep. 502; *Williams v. Walker*, 2 Sandf. Ch. (N. Y.) 325; *Henn v. Conisby*, 1 Ch. Cas. 93; *Orient Ins. Co. v. Hayes*, 61 Neb. 173, 85 N. W. 57.

*Power to Enforce Judgment*

An attorney has implied authority to employ the usual means to realize on the judgment. He may sue out and manage the execution,<sup>68</sup> delay its issue, or stay proceedings under it;<sup>69</sup> but he cannot assign the judgment,<sup>70</sup> nor release the lien of the judgment or execution,<sup>71</sup> nor satisfy the judgment without payment of the full amount.<sup>72</sup> But an attorney's unauthorized satisfaction of a judgment may be binding on the client as against a bona fide purchaser.<sup>73</sup> It is said that, after judgment, an attorney's powers are limited to receiving satisfaction;<sup>74</sup> but the tendency is to relax the rule. An attorney employed to collect a debt has the same implied powers after judgment as before.<sup>75</sup> The authority may be continued by any acts showing the client's intention that his attorney shall continue to act in that relation.<sup>76</sup>

<sup>68</sup> *Union Bank of Georgetown v. Geary*, 5 Pet. 99, 8 L. Ed. 60; *Farmers' Bank of Maryland v. Mackall*, 3 Gill (Md.) 447; *White v. Johnson*, 67 Me. 287; *Gorham v. Gale*, 7 Cow. (N. Y.) 739, 17 Am. Dec. 549; *Lynch v. Com. to Use of Barton*, 16 Serg. & R. (Pa.) 368, 16 Am. Dec. 582; *Brackett v. Norton*, 4 Conn. 517, 10 Am. Dec. 179; *Conway County v. Little Rock & Ft. S. R. Co.*, 39 Ark. 50. He may direct the time and manner of enforcing execution. *Gorham v. Gale*, 7 Cow. (N. Y.) 739, 17 Am. Dec. 549; *Barber v. Dewes*, 101 App. Div. 432, 91 N. Y. Supp. 1059, affirmed 184 N. Y. 548, 76 N. E. 1089, mem.

<sup>69</sup> *Wieland v. White*, 109 Mass. 392; *Silvis v. Ely*, 3 Watts & S. (Pa.) 420; *White v. Johnson*, 67 Me. 287. But not for so long a period that the judgment lien would be lost. *Doe ex dem. Reynolds v. Ingersoll*, 11 Smedes & M. (Miss.) 249, 49 Am. Dec. 57. After levy of execution, attorney may delay a sale. *Albertson v. Goldsby*, 28 Ala. 711, 65 Am. Dec. 380. Attorney at law has no authority to direct what shall be sold under his client's execution. *Averill v. Williams*, 4 Denio (N. Y.) 295, 47 Am. Dec. 252; *Welsh v. Cochran*, 63 N. Y. 185, 20 Am. Rep. 519.

<sup>70</sup> *Banks v. Evans*, 10 Smedes & M. (Miss.) 35, 48 Am. Dec. 734.

<sup>71</sup> *Banks v. Evans*, 10 Smedes & M. (Miss.) 38, 48 Am. Dec. 734; *Jewett v. Wadleigh*, 32 Me. 110; *Fritchey v. Bosley*, 56 Md. 96; *Phillips v. Dobbins*, 56 Ga. 617. Or discharge defendant from imprisonment. *Kellogg v. Gilbert*, 10 Johns. (N. Y.) 220, 6 Am. Dec. 335.

<sup>72</sup> *Beers v. Hendrickson*, 45 N. Y. 665; *Kirk's Appeal*, 87 Pa. 243, 30 Am. Rep. 357; *Banks v. Evans*, 10 Smedes & M. (Miss.) 35, 48 Am. Dec. 734; *Trumbull v. Nicholson*, 27 Ill. 149; *McCarver v. Nealey*, 1 G. Greene (Iowa) 360; *Smock v. Dade*, 5 Rand. (Va.) 639, 16 Am. Dec. 780; *Lewis v. Gamage*, 1 Pick. (Mass.) 347; *Lewis v. Woodruff*, 15 How. Prac. (N. Y.) 539; *Benedict v. Smith*, 10 Paige (N. Y.) 128; *Jackson v. Bartlett*, 8 Johns. (N. Y.) 361; *Chapman v. Cowles*, 41 Ala. 103, 91 Am. Dec. 508.

<sup>73</sup> *Wycoff v. Bergen*, 1 N. J. Law, 214; *Weeks, Attys. at Law*, § 242; *Whart. Ag.* § 588.

<sup>74</sup> *Weeks, Attys. at Law*, § 238.

<sup>75</sup> *McDonald v. Todd*, 1 Grant, Cas. (Pa.) 17; *Butler v. Knight*, L. R. 2 Exch. 109.

<sup>76</sup> *Id.*; *Weeks, Attys. at Law*, § 238.

*Employment of Subordinates and Substitutes*

The relation of attorney and client is peculiarly a relation of trust and confidence. Because of the attorney's large discretionary powers, he is presumably chosen for personal reasons, and therefore he cannot delegate his authority to a substitute without the client's consent.<sup>77</sup> Such consent, however, may be either express or implied, or such delegation may be ratified, in either of which cases the substitute becomes authorized to act for the client. Ratification may be presumed from acquiescence.<sup>78</sup> The retainer of one member of a firm is a retainer of all, and, unless otherwise stipulated, the cause may be argued and conducted by any one of them.<sup>79</sup> Matters not involving discretion, however, may be delegated to subordinates, to be performed under the direction and control of the attorney.<sup>80</sup>

*Power to Bind Client by Bond*

Where the execution of a bond or other undertaking becomes necessary in the due prosecution of a cause, and it is impossible to communicate with the client in time to accomplish the object, an attorney has implied power to execute the bond or undertaking in his client's name, provided it is not required to be under seal;<sup>81</sup> or he may do so in his own name, and look to his client for indemnity.<sup>82</sup> The power exists only in case of necessity.<sup>83</sup> Where the client is present, or

<sup>77</sup> *In re Bleakley*, 5 Paige (N. Y.) 311; *Hitchcock v. McGehee*, 7 Port. (Ala.) 556; *Kellogg v. Norris*, 10 Ark. 18; *Ratcliff v. Baird*, 14 Tex. 43; *Antrobus v. Sherman*, 65 Iowa, 230, 21 N. W. 579, 54 Am. Rep. 7; *Smalley v. Greene*, 52 Iowa, 241, 3 N. W. 78, 35 Am. Rep. 267; *Dickson v. Wright*, 52 Miss. 585, 24 Am. Rep. 677; *Northern Pac. R. Co. v. Clarke*, 106 Fed. 794, 45 C. C. A. 635; *Lacher v. Gordon*, 127 App. Div. 140, 111 N. Y. Supp. 283; *Chicago & S. Traction Co. v. Flaherty*, 222 Ill. 67, 78 N. E. 29. But see *Reich v. Cochran*, 105 App. Div. 542, 94 N. Y. Supp. 404, affirmed 201 N. Y. 450, 94 N. E. 1080.

<sup>78</sup> *Eggleston v. Boardman*, 37 Mich. 14; *Briggs v. Town of Georgia*, 10 Vt. 68. Client is not bound by acts of unauthorized substitute. *Kellogg v. Norris*, 10 Ark. 18. See, also, *Dickson v. Wright*, 52 Miss. 585, 24 Am. Rep. 677. A client is not liable to an attorney for services rendered without his knowledge at the request of the attorney employed by him. *Moore v. Orr*, 10 Ind. App. 89, 37 N. E. 554. Cf. *Hyde v. Moxie Nerve-Food Co.*, 160 Mass. 559, 36 N. E. 585; *Chicago & S. Traction Co. v. Flaherty*, 222 Ill. 67, 78 N. E. 29; *Porter v. Elizalde*, 125 Cal. 204, 57 Pac. 899; *Chester v. Jumel*, 53 Hun, 629, 5 N. Y. Supp. 809 (reversed on other grounds 125 N. Y. 237, 26 N. E. 297); *Rotberg v. Hebron*, 94 Misc. Rep. 225, 157 N. Y. Supp. 788.

<sup>79</sup> *Eggleston v. Boardman*, 37 Mich. 14; *Ganzer v. Schiffbauer*, 40 Neb. 633, 59 N. W. 98.

<sup>80</sup> *Eggleston v. Boardman*, supra; *McEwen v. Mazyck*, 3 Rich. (S. C.) 210.

<sup>81</sup> *Clark v. Courser*, 29 N. H. 170.

<sup>82</sup> *Clark v. Randall*, 9 Wis. 135, 76 Am. Dec. 252.

<sup>83</sup> *Clark v. Randall*, supra; *Schoregge v. Gordon*, 29 Minn. 367, 13 N. W. 194; *Fulton v. Brown*, 10 La. Ann. 350; *Mechem*, Ag. § 816.

within reach, and can act for himself, the attorney has no such implied power. The attorney's unauthorized act is ratified by the acceptance of benefits.<sup>84</sup>

## RIGHTS AND LIABILITIES—GOOD FAITH AND FAIRNESS

### 5. An attorney must exercise perfect good faith and fairness in all his dealings with his client.

An attorney is bound to the highest honor and integrity and the utmost good faith in all his transactions with his client.<sup>85</sup> The relation is a fiduciary one of the closest intimacy, and is jealously guarded by the courts. Transactions between attorney and client by which the former obtains a benefit are closely scrutinized, and all the rules and presumptions which apply in the case of other fiduciary relations apply with special force to this.<sup>86</sup> "Where a solicitor purchases or obtains a benefit from a client, a court of equity expects him to be able to show that he has taken no advantage of his professional position, that the client was so dealing with him as to be free from the influence which a solicitor must necessarily possess, and that the solicitor has done as much to protect his client's interest as he would have done in the case of a client dealing with a stranger."<sup>87</sup> "An attorney can in no case, without the client's consent, buy and hold, otherwise than in trust, any adverse title or interest touching the thing to which his employment relates."<sup>88</sup> It is an attorney's duty to disclose any adverse

<sup>84</sup> *Bank of Augusta v. Conrey*, 28 Miss. 667.

<sup>85</sup> *Cox v. Sullivan*, 7 Ga. 144, 50 Am. Dec. 386; *Trulin v. Plestad* (Iowa) 159 N. W. 633; *In re McDermit*, 63 N. J. Law, 476, 43 Atl. 685; *Audley v. Jester*, 148 App. Div. 94, 132 N. Y. Supp. 1061, affirmed 212 N. Y. 573, 106 N. E. 1032; *Barker v. Wiseman* (Okla.) 151 Pac. 1047.

<sup>86</sup> *Mechem*, Ag. (2d Ed.) § 2188. As to purchase of client's property and of claims against client, see *Mitchell v. Colby*, 95 Iowa, 202, 63 N. W. 769; *Sutherland v. Reeve*, 151 Ill. 384, 38 N. E. 130; *Owers v. Olathe Silver Min. Co.*, 6 Colo. App. 1, 39 Pac. 980; *Kreitzer v. Crovatt*, 94 Ga. 694, 21 S. E. 585; *Ryan v. Hayes*, 190 Ill. App. 208.

<sup>87</sup> *Savery v. King*, 5 H. L. Cas. 655. See, also, *Merryman v. Euler*, 59 Md. 588, 43 Am. Rep. 564; *Whipple v. Barton*, 63 N. H. 613, 3 Atl. 922; *Yeamans v. James*, 27 Kan. 195; *Gray v. Emmons*, 7 Mich. 533; *Laclede Bank v. Keeler*, 109 Ill. 385; *Kisling v. Shaw*, 33 Cal. 425, 91 Am. Dec. 644; *Starr v. Vanderheyden*, 9 Johns. (N. Y.) 253, 6 Am. Dec. 275; *Zeigler v. Hughes*, 55 Ill. 288.

<sup>88</sup> *Henry v. Raiman*, 25 Pa. 354, 64 Am. Dec. 703. See, also, *Smith v. Brotherline*, 62 Pa. 461; *Hockenbury v. Carlisle*, 5 Watts & S. (Pa.) 348; *Case v. Carroll*, 35 N. Y. 385; *Giddings v. Eastman*, 5 Paige (N. Y.) 561; *Moore v. Bracken*, 27 Ill. 23. See *Cameron v. Lewis*, 56 Miss. 601, as to attorney's

interest that he may have, personally or as attorney for others, and, having accepted a retainer, he cannot thereafter accept conflicting interests.<sup>89</sup> An attorney cannot act as such to both parties.<sup>90</sup> These obligations of an attorney will be enforced summarily by the court, by virtue of its control over its own officers, or they may be enforced by private action.<sup>91</sup>

## **SAME—DUTY TO ACCOUNT—LIABILITY FOR MONEY RECEIVED**

### **6. An attorney must account for property of the client coming into his possession, and promptly pay over money collected for the client's account.**

An attorney must account to his client for money or property of the latter coming into his hands. An action cannot ordinarily be maintained against an attorney for money collected by him as such until after a demand and refusal to pay over.<sup>92</sup> But it is the attorney's duty to notify his client of the receipt of money within a reasonable time, and, if he fails to do so, an action may be maintained without a demand.<sup>93</sup> The statute of limitations does not run against such an action until the client has notice of the collection.<sup>94</sup>

right to purchase of tax title of client's land. Cf. *Bowers v. Virden*, 56 Miss. 595. See, also, *Harper v. Perry*, 28 Iowa, 58; *Baker v. Humphrey*, 101 U. S. 494, 25 L. Ed. 1065.

The mere fact that one party is a lawyer is not enough. *Stout v. Smith*, 98 N. Y. 25, 50 Am. Rep. 632.

<sup>89</sup> *Williams v. Reed*, 3 Mason, 405, Fed. Cas. No. 17,733; *Mechem, Ag.* (2d Ed.) § 2189.

<sup>90</sup> *Mechem, Ag.* (2d Ed.) § 2190. But under exceptional circumstances he may. *Eisemann v. Hazard*, 218 N. Y. 155, 112 N. E. 722.

<sup>91</sup> *Cooley, Torts*, p. 618.

<sup>92</sup> *Jett v. Hempstead*, 25 Ark. 464; *Chapman v. Burt*, 77 Ill. 337; *Black v. Hersch*, 18 Ind. 342, 81 Am. Dec. 362; *Roberts v. Armstrong's Adm'r*, 1 Bush (Ky.) 263, 89 Am. Dec. 624. Cf. *Schroeppel v. Corning*, 6 N. Y. 117; *Lillie v. Hoyt*, 5 Hill (N. Y.) 395, 40 Am. Dec. 360.

<sup>93</sup> *Jett v. Hempstead*, 25 Ark. 464; *Chapman v. Burt*, 77 Ill. 337; *Jordan v. Westerman*, 62 Mich. 170, 28 N. W. 826, 4 Am. St. Rep. 836; *Kelley v. Repetto*, 62 N. J. Eq. 246, 49 Atl. 429; *Kelly v. Allin*, 212 Mass. 327, 99 N. E. 273; *Secov v. Tradesmen's Nat. Bank of City of New York*, 148 App. Div. 141, 133 N. Y. Supp. 197; *People v. Ehle*, 273 Ill. 424, 112 N. E. 970. See *Mechem, Ag.* (2d Ed.) § 2208.

<sup>94</sup> *Jett v. Hempstead*, 25 Ark. 464; *Voss v. Bachop*, 5 Kan. 67; *Way v. Cutting*, 20 N. H. 187.

## SAME—LIABILITY FOR NEGLIGENCE

7. An attorney must possess and exercise that reasonable degree of skill and care which is ordinarily possessed by other attorneys in the same locality. Failure to do so is actionable negligence.

An attorney is bound to possess and exercise diligently and faithfully that reasonable degree of learning, skill, and experience which is ordinarily possessed by other members of the profession.<sup>95</sup> As to attorneys, Tindal, C. J., has said: <sup>96</sup> "It would be extremely difficult to define the exact limit by which the skill and diligence which an attorney undertakes to furnish in the conduct of a cause is bounded, or to trace precisely the dividing line between that reasonable skill and diligence which appears to satisfy his undertaking and that 'crasse negligentia' or 'lata culpa,' mentioned in some of the cases, for which he is undoubtedly responsible. The cases, however, \* \* \* appear to establish, in general, that he is liable for the consequences of ignorance or nonobservance of the rules of practice of this court,<sup>97</sup> for the want of care in the preparation of the cause for trial<sup>98</sup> or of attendance thereon with his witnesses, and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession; while, on the other hand, he is not answerable for error in judgment upon points of new occurrence or of nice or doubtful construction." "God forbid that it should be imagined that an attorney, or even a judge, is bound to know all the law."<sup>99</sup> The liability of an English attorney or solicitor<sup>1</sup> is essentially

<sup>95</sup> *City of Terre Haute v. Hudnut*, 112 Ind. 542, 13 N. E. 686; *National Savings Bank v. Ward*, 100 U. S. 195, 25 L. Ed. 621; *Maryland Casualty Co. v. Price*, 231 Fed. 397, 145 C. C. A. 391, Ann. Cas. 1917B, 50; *French v. Armstrong*, 80 N. J. Law, 152, 76 Atl. 336; *Parker Smith v. Prince Mfg. Co.*, 172 App. Div. 302, 158 N. Y. Supp. 346.

<sup>96</sup> *Godefroy v. Dalton*, 6 Bing. 467, 469. Further, as to difference as to English members of the bar, see *Ireson v. Pearman*, 3 Barn. & C. 799. An action for professional negligence will not lie against the barrister. *Swinfen v. Chelmsford*, 5 Hurl. & N. 918, 29 Law J. Exch. 382.

<sup>97</sup> *Caldwell v. Hunter*, 10 Q. B. 83; *Bracey v. Carter*, 12 Adol. & E. 373. Negligently suffering judgment by default. *Godefroy v. Jay*, 7 Bing. 413; *Hoby v. Built*, 3 Barn. & Adol. 350.

<sup>98</sup> Or bringing an action in a court without jurisdiction. *Williams v. Gibbs*, 6 Nev. & M. 788; *Cox v. Leech*, 1 C. B. (N. S.) 617, 26 Law J. C. P. 125. Cf. *Meredith v. Woodward*, 16 Wkly. Notes Cas. (Pa.) 146.

<sup>99</sup> *Abbott, C. J.*, in *Montrieu v. Jefferys*, 2 Car. & P. 113. Lord Mansfield's

<sup>1</sup> *Hart v. Frame*, 6 Clark & F. 193; *Caldwell v. Hunter*, 10 Q. B. 83; *Parker v. Rolls*, 14 C. B. 691; *Purves v. Landell*, 12 Clark & F. 91.

that of a member of the bar in America, viz. he is required to exercise such diligence as a good lawyer is accustomed to apply under similar circumstances.<sup>2</sup> He cannot be held liable for a mistake in reference to a matter as to which members of the profession possessed of reasonable skill and knowledge may differ as to the law until it has been settled in the courts, nor if he is mistaken in a point of law on which reasonable doubt may be entertained by well-informed lawyers.<sup>3</sup> The standard of skill required of lawyers is substantially the same as that of physicians.<sup>4</sup> It is determined by the particular prac-

saying in *Pitt v. Yalden*, 4 Burrows, 2060, 2061, is famous: "That part of the profession which is carried on by attorneys is liberal and reputable, as well as useful to the public, when they conduct themselves with honor and integrity; and they ought to be protected when they act to the best of their skill and knowledge. But every man is liable to error, and I should be very sorry that it should be taken for granted that an attorney is answerable for every error or mistake. \* \* \* A counsel may mistake, as well as an attorney. Yet no one will say that a counsel who has been mistaken shall be charged. \* \* \* Not only a counsel, but judges, may differ or doubt, or take time to consider. Therefore, an attorney ought not to be liable in case of a reasonable doubt." The saying of Lord Cottenham in *Hart v. Frame*, 6 Clark & F. 193, is also much quoted. Et vide *Laidler v. Elliott*, 3 Barn. & C. 738; *Russell v. Palmer*, 2 Wils. 325. See *Poucher v. Blanchard*, 86 N. Y. 256.

<sup>2</sup> Whart. Neg. § 749; *Sprague v. Baker*, 17 Mass. 586; *Kepler v. Jessup*, 11 Ind. App. 241, 37 N. E. 655, 38 N. E. 826; *Isham v. Parker*, 3 Wash. 755, 29 Pac. 835; *White v. Washington*, 1 Barnes, Notes Cas. 411; *Holmes v. Peck*, 1 R. I. 242; *Stevens v. Walker*, 55 Ill. 151; *Wilson v. Russ*, 20 Me. 421; *Stubbs v. Beene's Adm'r*, 37 Ala. 627; *Gambert v. Hart*, 44 Cal. 542. Reasonable care and diligence. *Kepler v. Jessup*, 11 Ind. App. 241, 37 N. E. 655, 38 N. E. 826. A contract for the services of members of a legal profession is not a hiring of labor, but a mandate. *Gurley v. City of New Orleans*, 41 La. Ann. 75, 5 South. 659. Generally, as to liability of attorneys for erroneous advice, see 4 Yale Law J. 65, by William B. Bosley. Generally, as to liability for negligence, see *Kepler v. Jessup*, 11 Ind. App. 241, 37 N. E. 655, 38 N. E. 826; *Wain v. Beaver*, 161 Pa. 605, 29 Atl. 114, 493; *Ahlhauser v. Butler* (C. C.) 57 Fed. 121; *Pinkston v. Arrington*, 98 Ala. 489, 13 South. 561; *Cohn v. Heusner*, 9 Misc. Rep. 482, 30 N. Y. Supp. 244; *King v. Fourchy*, 47 La. Ann. 354, 16 South. 814.

<sup>3</sup> *Citizens' Loan Fund & Sav. Ass'n v. Friedley*, 123 Ind. 143, 23 N. E. 1075, 7 L. R. A. 669, 18 Am. St. Rep. 320. Cf. *Cochrane v. Little*, 71 Md. 323, 18 Atl. 698. An attorney cannot be charged with negligence when he accepts, as a correct exposition of the law, a decision of the supreme court of his state in another case upon the question of the liability of stockholders of corporations of the state, in advance of any decision thereon in his own case. *Marsh v. Whitmore*, 21 Wall. 178, 22 L. Ed. 482. Nor is he liable for an insufficient affidavit in attachment. *Ahlhauser v. Butler* (C. C.) 57 Fed. 121; *Gabbert v. Evans*, 184 Mo. App. 283, 166 S. W. 635.

<sup>4</sup> *Watson v. Muirhead*, 57 Pa. 161, 98 Am. Dec. 213. "The law is not a mere art, but a science." *Sharswood, J.*, in *Citizens' Loan, Fund & Sav. Ass'n v. Friedley*, 123 Ind. 143, 23 N. E. 1075, 7 L. R. A. 669, 18 Am. St. Rep. 320, reviewing many cases. Approved in *Nickless v. Pearson*, 126 Ind. 490, 26 N. E. 478.



tice of the particular bar. "A metropolitan standard is not to be applied to a rural bar."<sup>5</sup> A lawyer is not expected to guaranty success.<sup>6</sup> This standard would not seem consistent with the early theory that an attorney at law is not liable if he acts honestly and to the best of his ability.<sup>7</sup> Of course, he must exercise reasonable diligence generally in the conduct of his client's business.<sup>8</sup> Thus, in examination of titles, he must scrutinize vigilantly, and is liable, for example, for failure to note the existence of an incumbrance.<sup>9</sup> But, as to doubtful points of law, it is sufficient if he conforms to the standard of good professional men of the place.<sup>10</sup> An attorney, as bailee of papers or

<sup>5</sup> Weeks, Attys. at Law, § 289; Pennington's Ex'rs v. Yell, 11 Ark. 212, 52 Am. Dec. 262; Whart. Neg. § 750; Citizens' Loan Fund & Sav. Ass'n v. Friedley, 123 Ind. 143, 23 N. E. 1075, 7 L. R. A. 669, 18 Am. St. Rep. 320; Kissam v. Bremerman, 44 App. Div. 588, 61 N. Y. Supp. 75.

<sup>6</sup> Weeks, Attys. at Law, § 290.

<sup>7</sup> Lynch v. Com. to Use of Barton, 16 Serg. & R. (Pa.) 368, 16 Am. Dec. 582; Crosbie v. Murphy, 8 Ir. C. L. 301; Kemp v. Burt, 4 Barn. & Adol. 424; Gilbert v. Williams, 8 Mass. 57, 5 Am. Dec. 77. He has, however, been held liable for gross negligence. Purves v. Landell, 12 Clark & F. 91; Baikie v. Chandless, 3 Camp. 17; Elkington v. Holland, 9 Mees. & W. 661.

<sup>8</sup> Failing to commence an action against a debtor in failing circumstances, Rhines' Adm'rs v. Evans, 66 Pa. 192, 5 Am. Rep. 364, or in time to avoid bar by the statute of limitations, Fox v. Jones (Tex. App.) 14 S. W. 1007; Hett v. Pun Pong, 18 Can. Sup. Ct. 290; failing to be present when his case is reached, City of Lincoln v. Staley, 32 Neb. 63, 48 N. W. 887; or to advise client as to expenses on appeal, Jamison v. Weaver, 81 Iowa, 212, 46 N. W. 996; making negligent investments Blyth v. Fladgate [1891] 1 Ch. 337 (et vide Mellish, L. J., in Sawyer v. Goodwin, 1 Ch. Div. 351); loaning money, Whitney v. Martine, 88 N. Y. 535; for not notifying his client of impending tax sales, Waln v. Beaver, 161 Pa. 605, 29 Atl. 114, 493; for negligence in preparing mechanic's lien, Joy v. Morgan, 35 Minn. 184, 28 N. W. 237; generally, for misdescription, Taylor v. Gorman, 4 Ir. Eq. 550; for loss of bond, Walpole v. Carlisle, 32 Ind. 415. Not liable for failure to transfer insurance policy to vendee, Herbert v. Lukens, 153 Pa. 180, 25 Atl. 1116. When not liable for failure to plead statutory limitations, Thompson v. Dickinson, 159 Mass. 210, 34 N. E. 262.

<sup>9</sup> Pennoyer v. Willis (Or.) 32 Pac. 57. But, even under such circumstances, the question of negligence has been left to the jury. Pinkston v. Arrington, 98 Ala. 489, 13 South. 561. And see Hinckley v. Krug, 4 Cal. Unrep. 208, 34 Pac. 118.

<sup>10</sup> Watson v. Muirhead, 57 Pa. 161, 98 Am. Dec. 213; Whart. Ag. § 597; Potts v. Dutton, 8 Beav. 493; Taylor v. Gorman, 4 Ir. Eq. 550; Wilson v. Tucker, 3 Starkie, 154 Dowl. N. P. 30; Knights v. Quarles, 4 Moore, 532; Allen v. Clark, 7 Law T. (N. S.) 781, 1 N. R. 358; Drax v. Scroope, 2 Barn. & Adol. 581; Stannard v. Ullithorne, 10 Bing. 491; Ireson v. Pearman, 5 Dowl. & R. 687; Howell v. Young, 5 Barn. & C. 259; Whitehead v. Greetham, 2 Bing. 464, 10 Moore, 183; Dartnall v. Howard, 4 Barn. & C. 345; Brumbridge v. Massey, 28 Law J. Exch. 59; Cooper v. Stephenson, 21 Law J. Q. B. 292; Hayne v. Rhodes, 8 Q. B. 342, 10 Jur. 71, 15 Law J. Q. B. 137.

other property of his client, is liable for failure to exercise ordinary care and diligence.

*Negligence of Associates, Partners, and Subordinates*

An attorney is not liable for the negligence of an associate, as distinguished from a partner or subordinate, where such associate is employed by the client, or employed by the attorney with the client's consent, express or implied, as where it is necessary to employ an associate to take depositions in a distant city. An attorney, however, is liable for negligence in selecting an associate.<sup>11</sup> Attorneys are also liable for the negligence of their partners,<sup>12</sup> clerks, or subordinates.<sup>13</sup> This liability rests on familiar principles of agency.

**SAME—LIABILITY FOR BREACH OF CONTRACT—EXCEEDING AUTHORITY**

**8. An attorney is liable for breach of the contract of employment.**

An attorney is, of course, liable for damages resulting from his breach of the contract of employment. He impliedly contracts to obey instructions,<sup>14</sup> and not to exceed his authority.<sup>15</sup> He is liable for default in either respect.

<sup>11</sup> Whart. Ag. § 601; *Godefroy v. Dalton*, 6 Bing. 468.

<sup>12</sup> *Wilkinson v. Griswold*, 12 Smedes & M. (Miss.) 669; *Poole v. Gist*, 4 McCord (S. C.) 259; *Smyth v. Harvie*, 31 Ill. 62, 83 Am. Dec. 202; *Livingston v. Cox*, 6 Pa. 360; *McFarland v. Crary*, 8 Cow. (N. Y.) 253; *Warner v. Griswold*, 8 Wend. (N. Y.) 665; *Priddy v. Mackenzie*, 205 Mo. 181, 103 S. W. 968.

<sup>13</sup> *Walker v. Stevens*, 79 Ill. 193; *Floyd v. Nangle*, 3 Atk. 568; *Birkbeck v. Stafford*, 14 Abb. Prac. (N. Y.) 285; *McGuinness v. Manhattan R. Co.*, 69 App. Div. 606, 74 N. Y. Supp. 1054.

<sup>14</sup> Where he fails to bring an action immediately as directed, he is liable for consequent damage to his client. *People ex rel. Hungate v. Cole*, 84 Ill. 327; *Gilbert v. Williams*, 8 Mass. 51, 5 Am. Dec. 77; *Cox v. Livingston*, 2 Watts & S. (Pa.) 103, 37 Am. Dec. 486; *Armstrong v. Craig*, 18 Barb. (N. Y.) 387.

<sup>15</sup> *Ward v. Price*, 25 N. J. Law, 225; *Ferguson v. Crawford*, 70 N. Y. 253, 26 Am. Rep. 589; *Chatfield v. Simonson*, 92 N. Y. 209; *Vooth v. McEachen*, 181 N. Y. 28, 73 N. E. 488, 2 Ann. Cas. 601.

Attorney is liable for unauthorized appearance whereby assumed client is damaged. *O'Hara v. Brophy*, 24 How. Prac. (N. Y.) 379.

## SAME—LIABILITY TO THIRD PERSONS

9. An attorney is not liable to third persons for breach of duty owing to his client alone; but, where his conduct violates a duty owed to third persons, growing out of his personal contract or imposed by law, he is so liable.

*Liability in Contract*

For breach of duty imposed upon him merely by virtue of his retainer, an attorney is liable to his client alone, for to him alone the duty is owing.<sup>16</sup> But for breach of a duty imposed upon him by law, as a responsible individual, in common with all other members of society, he is liable to any one harmed by the breach.<sup>17</sup> Thus, for negligence in the examination of title, an attorney is liable only to the person by whom he was employed, and not to a third person who relied on the attorney's certificate to his injury.<sup>18</sup> An attorney, however, like other agents, may assume a duty towards third persons, as where he contracts personally with them, and in such cases is liable accordingly.<sup>19</sup> An attorney is usually held personally liable for clerk's and sheriff's fees for issuing, filing, and serving writs and other papers.<sup>20</sup> This is on the ground "that an attorney placing a writ in an officer's hands for service is to be regarded as personally requesting the service, and as personally liable for it, unless he expressly informs him that he will not be personally liable, or there are circumstances which make it clear that that was the understanding of the parties."<sup>21</sup> In this view of the case, the rule is no departure from

<sup>16</sup> *National Sav. Bank of District of Columbia v. Ward*, 100 U. S. 195, 25 L. Ed. 621; *Dundee Mortg. & Trust Inv. Co. v. Hughes* (C. C.) 20 Fed. 39; *Buckley v. Gray*, 110 Cal. 339, 42 Pac. 900, 31 L. R. A. 862, 52 Am. St. Rep. 88.

<sup>17</sup> *Mechem, Ag.* (2d Ed.) § 2218.

<sup>18</sup> See cases cited in note 16, *supra*.

<sup>19</sup> *Good v. Rumsey*, 50 App. Div. 280, 63 N. Y. Supp. 981; *Meany v. Rosenberg*, 28 Misc. Rep. 520, 59 N. Y. Supp. 582.

He is liable for clerk's and sheriff's fees when he promises to pay them. *Wires v. Briggs*, 5 Vt. 101, 26 Am. Dec. 284; *Preston v. Preston*, 1 Doug. (Mich.) 292.

Usually presumed that he did not intend to bind himself, for example, in printing brief. *Argus Co. v. Hotchkiss*, 121 App. Div. 378, 107 N. Y. Supp. 138. But see *Trimmier v. Thomson*, 41 S. C. 125, 19 S. E. 291. *Stenographer's fee. Bonyng v. Field*, 81 N. Y. 159.

<sup>20</sup> *Campbell v. Cothran*, 56 N. Y. 279; *Adams v. Hopkins*, 5 Johns. (N. Y.) 252; *Ousterhout v. Day*, 9 Johns. (N. Y.) 114; *Watertown v. Cowan*, 5 Paige (N. Y.) 510; *Heath v. Bates*, 49 Conn. 342, 44 Am. Rep. 234; *Tilton v. Wright*, 74 Me. 214, 43 Am. Rep. 578. Rule criticized in *Judson v. Gray*, 11 N. Y. 408.

<sup>21</sup> *Heath v. Bates*, 49 Conn. 342, 44 Am. Rep. 234.

the general law of agency, and is supported by the additional argument of convenience. The rule, however, has not been universally followed. In Michigan it has been held that an attorney is liable for such fees only upon proof of his express promise to pay them, or of some practice or course of dealing between him and the clerk from which such personal promise can be implied.<sup>22</sup> The rule is the same in Vermont.<sup>23</sup>

### *Liability in Tort*

Attorneys are liable for torts on the same principles that other persons are.<sup>24</sup> Thus, attorneys may be liable for malicious prosecution, where the malice is their own, and they have no probable cause. But it may be that evidence which would show a want of probable cause for the client would not establish the same thing as to the attorney.<sup>25</sup> Where an attorney acts in good faith, he is not liable, though the action on his client's part was malicious and without probable cause.<sup>26</sup> An attorney may rely on the facts stated by his client.<sup>27</sup> As in trespass liability is wholly independent of motive, an attorney, even though acting in good faith, is liable if he participates in a trespass. Thus, an attorney who directs the execution of a void writ is liable in trespass to the person injured.<sup>28</sup> The client and officer are also liable.<sup>29</sup> They are joint trespassers. The attorney and client are not liable, however, even though the writ is void, where the officer exceeds the command of the writ,<sup>30</sup> unless they individually participate in, direct, or ratify the act which constitutes the trespass.<sup>31</sup>

<sup>22</sup> *Preston v. Preston*, 1 Doug. (Mich.) 292.

<sup>23</sup> *Wires v. Briggs*, 5 Vt. 101, 26 Am. Dec. 284.

<sup>24</sup> Attorneys are liable for fraud or collusion, and cannot injure a third person without liability. Such conduct violates a right in rem. *National Sav. Bank of District of Columbia v. Ward*, 100 U. S. 195, 25 L. Ed. 621.

<sup>25</sup> *Burnap v. Marsh*, 13 Ill. 535; *Lynch v. Com.*, to Use of Barton, 16 Serg. & R. (Pa.) 368, 16 Am. Dec. 582; *Peck v. Chouteau*, 91 Mo. 139, 3 S. W. 577, 60 Am. Rep. 236.

<sup>26</sup> *Stockley v. Hornidge*, 8 Car. & P. 11; *Hunt v. Printup*, 28 Ga. 297. And see cases cited supra, note 25; *Schalk v. Kingsley*, 42 N. J. Law, 32.

<sup>27</sup> *Burnap v. Marsh*, 13 Ill. 535; *Peck v. Chouteau*, 91 Mo. 139, 3 S. W. 577, 60 Am. Rep. 236.

<sup>28</sup> *Burnap v. Marsh*, 13 Ill. 535; *Cook v. Hopper*, 23 Mich. 511. But see *Ross v. Griffin*, 53 Mich. 5, 18 N. W. 534 (judicial privilege).

<sup>29</sup> *Newberry v. Lee*, 3 Hill (N. Y.) 525; *Foster v. Wiley*, 27 Mich. 244, 15 Am. Rep. 185; *Bates v. Pilling*, 6 Barn. & C. 38.

<sup>30</sup> *Averill v. Williams*, 1 Denio (N. Y.) 501; *Adams v. Freeman*, 9 Johns. (N. Y.) 118; *Ford v. Williams*, 13 N. Y. 577, 67 Am. Dec. 83; *Id.*, 24 N. Y. 359.

<sup>31</sup> *Cook v. Hopper*, 23 Mich. 511; *Hardy v. Keeler*, 56 Ill. 152; *Welsh v. Cochran*, 63 N. Y. 181, 20 Am. Rep. 519; *Averill v. Williams*, 4 Denio (N. Y.) 295, 47 Am. Dec. 252. See, also, *Vanderbilt v. Richmond Turnpike Co.*, 2 N. Y. 479, 51 Am. Dec. 315.

Where an attorney assumes to act wholly without authority, he is liable to any one damaged by his unauthorized act.<sup>32</sup>

### SAME—REIMBURSEMENT AND INDEMNITY

#### 10. An attorney is entitled to reimbursement and indemnity from his client.

A client must reimburse his attorney for all reasonable expenses advanced in the course of litigation, and indemnify him against liabilities incurred.<sup>33</sup>

### SAME—COMPENSATION

#### 11. An attorney is entitled to compensation for his services. This is determined either—

- (a) By contract, or
- (b) By quantum meruit.

Attorneys are prima facie entitled to compensation for their services, and may maintain an action therefor,<sup>34</sup> unless they have specially agreed to serve gratuitously, and the burden of showing such special agreement is on the client.<sup>35</sup> The right to compensation and its extent is determined by the contract when there is one.<sup>36</sup> Where there is no contract on the subject, the attorney may recover on a

<sup>32</sup> Burnap v. Marsh, 13 Ill. 535.

<sup>33</sup> Clark v. Randall, 9 Wis. 135, 76 Am. Dec. 252; *Campion v. King*, 6 Jur. 35; *Forbes v. Chicago, R. I. & P. R. Co.*, 150 Iowa, 177, 129 N. W. 810, Ann. Cas. 1912D, 311; *Townsend v. Meyers*, 142 App. Div. 851, 127 N. Y. Supp. 451; *Matter of Carney*, 93 Misc. Rep. 600, 158 N. Y. Supp. 585.

<sup>34</sup> *Wylie v. Coxe*, 15 How. 415, 14 L. Ed. 753; *Stanton v. Embry*, 93 U. S. 548, 23 L. Ed. 983; *Brackett v. Sears*, 15 Mich. 244; *Eggleston v. Boardman*, 37 Mich. 14; *Smith v. Davis*, 45 N. H. 566; *Nichols v. Scott*, 12 Vt. 47; *Webb v. Browning*, 14 Mo. 354; *Harland v. Lilienthal*, 53 N. Y. 438; *Balsbaugh v. Frazer*, 19 Pa. 95. Cf. *Seeley v. Crane*, 15 N. J. Law, 35; *Law v. Ewell*, 2 Cranch, C. C. 144, Fed. Cas. No. 8,127; *Mowat v. Brown (C. C.)* 19 Fed. 87. And see *Hassell v. Van Houten*, 39 N. J. Eq. 105; *Brackenridge v. McFarlane, Add. (Pa.)* 49; *Murray v. Waring Hat Mfg. Co.*, 142 App. Div. 514, 127 N. Y. Supp. 78; *Ransom v. Cutting*, 112 App. Div. 150, 98 N. Y. Supp. 282, affirmed 188 N. Y. 447, 81 N. E. 324.

<sup>35</sup> *Brady v. City of New York*, 1 Sandf. (N. Y.) 569; *Webb v. Browning*, 14 Mo. 354.

<sup>36</sup> *Moses v. Bagley*, 55 Ga. 283; *Badger v. Gallaher*, 113 Ill. 662; *Hitchings v. Van Brunt*, 38 N. Y. 335; *Tapley v. Coffin*, 12 Gray (Mass.) 420; *Stanton v. Embry*, 93 U. S. 548, 23 L. Ed. 983.

quantum meruit.<sup>37</sup> The parties may make such contracts as they please, provided they are fairly entered into and are neither extortionate nor champertous.<sup>38</sup> Compensation may be made contingent on success, or proportioned to the amount of recovery.<sup>39</sup> The cases are not wholly agreed as to what contracts are champertous. The modern tendency is certainly against the old strictness. It is generally, but not universally, held that a contract whereby the attorney is to receive a part of the thing recovered as his compensation is not champertous, unless the attorney also agrees to pay the expenses of litigation.<sup>40</sup> It is in all cases essential, to constitute champerty, that there be an agreement for a portion of the very thing recovered. If there is no such agreement, but the attorney's compensation is to be a personal liability of the client, though proportioned to the amount of recovery, the agreement is not champertous. It is immaterial that the avails of the suit were the means or the security on which the attorney relied

<sup>37</sup> *Eggleston v. Boardman*, 37 Mich. 14; *Town of Bruce v. Dickey*, 116 Ill. 527, 6 N. E. 435; *Campbell v. Goddard*, 17 Ill. App. 385; *People v. Bond Street Sav. Bank*, 10 Abb. N. C. (N. Y.) 15; *Stanton v. Embry*, 93 U. S. 557, 23 L. Ed. 983; *Smith v. Chicago & N. W. Railroad Co.*, 60 Iowa, 515, 15 N. W. 291; *Strong v. Mundy*, 52 N. J. Eq. 833, 31 Atl. 611.

In New Jersey counsel cannot maintain a quantum meruit. *Bentley v. Fidelity & Deposit Co. of Maryland*, 75 N. J. Law, 828, 69 Atl. 202, 127 Am. St. Rep. 837, 15 Ann. Cas. 1178.

<sup>38</sup> *Wright v. Tebbitts*, 91 U. S. 252, 23 L. Ed. 320; *Taylor v. Bemiss*, 110 U. S. 42, 3 Sup. Ct. 441, 28 L. Ed. 64; *Boardman v. Thompson*, 25 Iowa, 489; *In re Pieris*, 82 App. Div. 466, 81 N. Y. Supp. 927, affirmed 176 N. Y. 566, 68 N. E. 1123.

<sup>39</sup> *Duke v. Harper*, 66 Mo. 51, 27 Am. Rep. 314; *Allard v. Lamirande*, 29 Wis. 502; *Kusterer v. City of Beaver Dam*, 56 Wis. 471, 14 N. W. 617, 43 Am. Rep. 725; *Stanton v. Embry*, 93 U. S. 548, 23 L. Ed. 983; *Taylor v. Bemiss*, 110 U. S. 42, 3 Sup. Ct. 441, 28 L. Ed. 64; *Wylie v. Cox*, 15 How. 415, 14 L. Ed. 753; *Perry v. Dicken*, 105 Pa. 83, 51 Am. Rep. 181; *Dale v. Richards*, 21 D. C. 312.

<sup>40</sup> *Duke v. Harper*, 66 Mo. 51, 27 Am. Rep. 314; *Coleman v. Billings*, 89 Ill. 183; *Martin v. Clarke*, 8 R. I. 389, 5 Am. Rep. 586; *Allard v. Lamirande*, 29 Wis. 502; *Backus v. Byron*, 4 Mich. 535; *Ware's Adm'r v. Russell*, 70 Ala. 174, 45 Am. Rep. 82; *Thurston v. Percival*, 1 Pick. (Mass.) 415; *Lathrop v. Amherst Bank*, 9 Metc. (Mass.) 489; *Smith v. Davis*, 45 N. H. 566; *Davis v. Sharron*, 15 B. Mon. (Ky.) 64; *Boardman v. Thompson*, 25 Iowa, 489. In Massachusetts an agreement to look solely to the fund for compensation without any personal liability on the part of the client is held to be champertous. *Blaisdell v. Ahern*, 144 Mass. 393, 11 N. E. 681, 59 Am. Rep. 99; *Moses v. Bagley*, 55 Ga. 283; *Granat v. Kruse*, 213 Ill. 328, 72 N. E. 744; *In re Evans*, 42 Utah, 282, 130 Pac. 217.

In New York, by statute, there is no champerty unless the attorney gives or promises value as an inducement to the placing of the claim in his hands. *Ransom v. Cutting*, n. 34, ante.

So in other states by statute. See *Mechem*, Ag. (2d Ed.) § 2238.

for payment, if it was to be payment of a debt due from the client.<sup>41</sup> Under any form of retainer the client may make a binding settlement of the suit in disregard of the attorney's claims;<sup>42</sup> and any contract that he shall not do so is generally considered void as against public policy.<sup>43</sup>

But, although the settlement of the case may be binding, the client will be liable for breach of contract to the attorney.<sup>44</sup> The attorney may recover at least the reasonable value of his services.<sup>45</sup> In fixing the value of an attorney's services, his professional skill and standing, his experience, the nature and character of the questions raised in the case, the amounts involved, and the result must all be considered.<sup>46</sup> Want of success, however, is no defense, in the absence of a special contract making compensation contingent on success.<sup>47</sup> The client may recoup damages for negligence or bad faith on the part of the attorney.<sup>48</sup> Where an attorney refuses to pay over money collected

<sup>41</sup> *Blaisdell v. Ahern*, 144 Mass. 393, 11 N. E. 681, 59 Am. Rep. 99.

<sup>42</sup> *Harton v. Amason*, 195 Ala. 594, 71 South. 181; *Carbajal's Succession*, 139 La. 481, 71 South. 774; *Cameron v. Boeger*, 200 Ill. 84, 65 N. E. 690, 93 Am. St. Rep. 165; *Southworth v. Rosendahl*, 133 Minn. 447, 158 N. W. 717; *Martin v. Camp*, 219 N. Y. 170, 114 N. E. 46.

<sup>43</sup> *North Chicago St. R. Co. v. Ackley*, 171 Ill. 100, 49 N. E. 222, 44 L. R. A. 177; *Southworth v. Rosendahl*, 133 Minn. 447, 158 N. W. 717; *Andrewes v. Haas*, 214 N. Y. 255, 108 N. E. 423; *Weller v. Jersey City, H. & P. St. R. Co.*, 68 N. J. Eq. 659, 61 Atl. 459, 6 Ann. Cas. 442; *Jackson v. Stearns*, 48 Or. 25, 84 Pac. 798, 5 L. R. A. (N. S.) 390. But see *Stiles v. Bruton*, 134 La. 523, 64 South. 399; *Lipscomb v. Adams*, 193 Mo. 530, 91 S. W. 1046, 112 Am. St. Rep. 500; *Beagles v. Robertson*, 135 Mo. App. 306, 115 S. W. 1042.

<sup>44</sup> *Kersey v. Garton*, 77 Mo. 645; *Polsley v. Anderson*, 7 W. Va. 202, 23 Am. Rep. 613.

<sup>45</sup> *Quint v. Ophir Silver Mining Co.*, 4 Nev. 305; *Western Union Tel. Co. v. Semmes*, 73 Md. 9, 20 Atl. 127; *Herndon v. Lammers* (Tex. Civ. App.) 55 S. W. 414; *Bissell v. Zorn*, 122 Mo. App. 688, 99 S. W. 458. That he may recover no more. *Andrewes v. Haas*, 214 N. Y. 255, 108 N. E. 423; *Martin v. Camp*, 219 N. Y. 170, 114 N. E. 46. See *Mechem*, Ag. (2d Ed.) § 2244.

<sup>46</sup> *Eggleston v. Boardman*, 37 Mich. 14; *Phelps v. Hunt*, 40 Conn. 97; *Robbins v. Harvey*, 5 Conn. 335; *Harland v. Lillenthal*, 53 N. Y. 438; *Selover v. Bryant*, 54 Minn. 434, 56 N. W. 58, 21 L. R. A. 418, 40 Am. St. Rep. 349; *Frink v. McComb* (C. C.) 60 Fed. 486. The wealth of a client cannot be considered. *Stevens v. Ellsworth*, 95 Iowa, 231, 63 N. W. 683; *Rachels v. Doniphan Lumber Co.*, 98 Ark. 529, 136 S. W. 658; *Graham v. Dubuque Specialty Mach. Works*, 138 Iowa, 456, 114 N. W. 619, 15 L. R. A. (N. S.) 729; *Randall v. Packard*, 142 N. Y. 47, 36 N. E. 823; *Heblich v. Slater*, 217 Pa. 404, 66 Atl. 655; *Szymanski v. Szymanski*, 151 Wis. 145, 138 N. W. 53.

<sup>47</sup> *Brackett v. Sears*, 15 Mich. 244; *Rush v. Cavanaugh*, 2 Pa. 187; *Bills v. Polk*, 4 Lea (Tenn.) 494. Disregard of instructions is a defense. *O'Halloran v. Marshall*, 8 Ind. App. 394, 35 N. E. 926; *French v. Cunningham*, 149 Ind. 632, 49 N. E. 797; *Harriman v. Baird*, 158 N. Y. 691, 53 N. E. 1126.

<sup>48</sup> *Chatfield v. Simonson*, 92 N. Y. 209; *Hopping v. Quin*, 12 Wend. (N. Y.) 517; *Caverly v. McOwen*, 123 Mass. 574; *Nixon v. Phelps*, 29 Vt. 198;

for his client, and the client is compelled to bring an action against him for the amount collected, the attorney forfeits any fees that may have been agreed upon for his services.<sup>49</sup> An attorney, retained generally to conduct a legal proceeding, enters into an entire contract to conduct the proceeding to its termination. If an attorney without just cause abandons his client before the proceeding for which he was retained has been conducted to its termination, he forfeits all right to payment for any services which he has rendered. The contract being entire, he must perform it entirely, in order to earn his compensation, and he is in the same position as any person who is engaged in rendering an entire service, who must show full performance before he can recover the stipulated compensation.<sup>50</sup> The rule is the same where the attorney is discharged by his client for cause.<sup>51</sup> Where however, the attorney has sufficient cause for abandoning the employment, he may always recover on a quantum meruit;<sup>52</sup> and it has been held, that when the services were rendered under a contract fixing the amount of compensation, he could recover the stipulated sum.<sup>53</sup> What shall be a sufficient cause to justify an attorney in abandoning a case in which he has been retained has not been laid down in any general rule, and cannot be. If the client refuses to advance money to pay the expenses of the litigation, or if he unreasonably refuses to advance money during the progress of a long litigation, to his attorney, to apply upon his compensation, sufficient cause may thus be furnished to justify the attorney in withdrawing from the service of his client. So any conduct on the part of the client, during the progress of the litigation, which would tend to degrade or humiliate

*Pearson v. Darrington*, 32 Ala. 227. Where an attorney advised his client in an action against a nonresident that service by publication was good, and a valid judgment could be obtained, such attorney cannot recover for services rendered therein. *Hinckley v. Krug*, 4 Cal. Unrep. Cas. 208, 34 Pac. 118.

<sup>49</sup> *Large v. Coyle* (Pa.) 12 Atl. 343; *Gray v. Conyers*, 70 Ga. 349; *Wills v. Kane*, 2 Grant, Cas. (Pa.) 60.

<sup>50</sup> *Tenney v. Berger*, 93 N. Y. 524, 529, 45 Am. Rep. 263; *Eliot v. Lawton*, 7 Allen (Mass.) 274, 83 Am. Dec. 683; *Davis v. Smith*, 48 Vt. 54. But see *Britton v. Turner*, 6 N. H. 481, 26 Am. Dec. 713; *McDonald v. De Vito*, 118 App. Div. 566, 103 N. Y. Supp. 508.

But in some states the doctrine of entirety probably would not be applied, following *Britton v. Turner*, 6 N. H. 481, 26 Am. Dec. 713. See *Mechem*, Ag. (2d Ed.) § 1578.

<sup>51</sup> *Walsh v. Shumway*, 65 Ill. 471.

<sup>52</sup> *Tenney v. Berger*, 93 N. Y. 524, 45 Am. Rep. 263; *Eliot v. Lawton*, 7 Allen (Mass.) 274, 83 Am. Dec. 683. And see *Verner v. Sullivan*, 26 S. C. 327, 2 S. E. 391.

<sup>53</sup> *Polsley v. Anderson*, 7 W. Va. 202, 23 Am. Rep. 613; *Baldwin v. Bennett*, 4 Cal. 392; *Kersey v. Garton*, 77 Mo. 645.



the attorney, such as attempting to sustain his case by the subornation of witnesses or other unjustifiable means, would furnish sufficient cause.<sup>54</sup> The employment by the client, without consent of or consultation with the attorney, of counsel with whom the attorney has personal and professional objections to being associated is sufficient cause.<sup>55</sup> The client, unless he has bound himself to employ the attorney for a stated period, may discharge him at any time, with or without cause.<sup>56</sup> If it is without cause, the attorney may recover the reasonable value of his services.<sup>57</sup> If the discharge is a breach of a contract to employ the attorney for a definite time, he may recover damages for such breach.<sup>58</sup> If the discharge is for cause, as has been seen, the attorney forfeits all right to compensation. Unfaithfulness, want of diligence and skill, and the like will justify a discharge.

### SAME—ATTORNEYS' LIENS

12. An attorney has a lien to secure his charges. Attorneys' liens are of two kinds:

- (a) The general, or retaining, lien; and
- (b) The special, or charging, lien.

13. RETAINING LIEN—An attorney's general or retaining lien is a right on the part of an attorney to retain all property of his client that comes into his possession in the course of his professional employment until all his costs and charges against his client are paid.<sup>59</sup>

<sup>54</sup> *Tenney v. Berger*, 93 N. Y. 530, 45 Am. Rep. 263; *Halbert v. Gibbs*, 16 App. Div. 126, 45 N. Y. Supp. 113; *Cullison v. Lindsay*, 108 Iowa, 124, 78 N. W. 847; *Silver Peak Gold Mining Co. v. Harris* (C. C.) 116 Fed. 439.

<sup>55</sup> *Id.*

<sup>56</sup> *Tenney v. Berger*, 93 N. Y. 524, 45 Am. Rep. 263; *Trust v. Repoor*, 15 How. Prac. (N. Y.) 570; *In re Prospect Ave.*, 85 Hun, 257, 32 N. Y. Supp. 1013. But the court will not permit a substitution until the attorney's fees and charges are first secured. *Ogden v. Devlin*, 45 N. Y. Super. Ct. 631; *Board of Sup'rs of Ulster Co. v. Brodhead*, 44 How. Prac. (N. Y.) 411; *Johnson v. Ravitch*, 113 App. Div. 810, 99 N. Y. Supp. 1059; *Root v. McIlvaine* (Ky.) 56 S. W. 498; *Underwood v. Piper* [1894] 2 Q. B. 306; *Martin v. Camp*, 219 N. Y. 170, 114 N. E. 46.

<sup>57</sup> *Tenney v. Berger*, 93 N. Y. 524, 45 Am. Rep. 263; *Ogden v. Devlin*, 45 N. Y. Super. Ct. 631; *Philbrook v. Moxie*, 191 Mass. 33, 77 N. E. 520; *Martin v. Camp*, 219 N. Y. 170, 114 N. E. 46.

<sup>58</sup> *Polsley v. Anderson*, 7 W. Va. 202, 23 Am. Rep. 613; *Baldwin v. Bennett*, 4 Cal. 392; *Myers v. Crockett*, 14 Tex. 257; *McElhinney v. Kline*, 6 Mo. App. 94; *French v. Cunningham*, 149 Ind. 632, 49 N. E. 797; *Dixon v. Volunteer Co-op. Bank*, 213 Mass. 345, 100 N. E. 655. But see *Martin v. Camp*, *supra*.

<sup>59</sup> *Jones, Liens*, § 113.

An attorney's general lien is a common-law lien,<sup>60</sup> and, like other common-law liens, it is founded on possession. It is a mere right to retain possession.<sup>61</sup> It cannot be enforced by sale, or by any proceeding in law or equity.<sup>62</sup> It is a mere right to embarrass the client by withholding possession.<sup>63</sup> But the lien continues until the debt secured is paid,<sup>64</sup> even though the debt is barred by the statute of limitations.<sup>65</sup> This lien is a general, as distinguished from a special, lien.<sup>66</sup> That is to say, it covers a general balance due the attorney from his client, and is not confined to charges due in the special matter in relation to which the property was received.<sup>67</sup> But it does not

<sup>60</sup> In some states this lien is declared by statute. Gen. Laws Colo. 1877, § 32; Gen. St. Colo. 1883, § 85; McClain's Code Iowa, 1888, § 293; Rev. Codes Dak. 1877, c. 18, §§ 9, 10; Civ. Code Ga. 1882, § 1989; Comp. Laws Kan. 1879, p. 114, §§ 468, 469; Gen. St. Ky. 1883, p. 149, § 15; Gen. St. Minn. 1894, § 6194; Hill's Ann. Laws Or. 1892, § 1044; Rev. St. Mont. 1879, p. 414, c. 3, § 54; Comp. St. Neb. 1881, c. 7, § 8; Rev. St. Wyo. 1887, § 138.

<sup>61</sup> In *re Wilson* (D. C.) 12 Fed. 237; *Heslop v. Metcalfe*, 3 Mylne & C. 183; *Bozon v. Bolland*, 4 Mylne & C. 354; *Colegrave v. Manley*, Turn. & R. 400.

<sup>62</sup> *Jones, Liens*, § 132; In *re Wilson* (D. C.) 12 Fed. 235; *Brown v. Bigley*, 3 Tenn. Ch. 618; *Thames Iron Works Co. v. Patent Derrick Co.*, 1 Johns. & H. 93; *Heslop v. Metcalfe*, 3 Mylne & C. 183; *Bozon v. Bolland*, 4 Mylne & C. 354.

<sup>63</sup> *West of England Bank v. Batchelor*, 51 Law J. Ch. 199. See, also, *Jones, Liens*, § 162. In *Doane v. Russell*, 3 Gray (Mass.) 382, Chief Justice Shaw says: "If it be said that a right to retain the goods, without the right to sell, is of little or no value, it may be answered that it is certainly not so adequate a security as a pledge with a power of sale; still, it is to be considered that both parties have rights which are to be regarded by the law, and the rule must be adapted to general convenience. In the greater number of cases, the lien for work is small in comparison with the value to the owner of the article subject to lien, and in most cases it would be for the interest of the owner to satisfy the lien and redeem the goods, as in the case of the tailor, the coach maker, the innkeeper, the carrier, and others; whereas, many times, it would cause great loss to the general owner to sell the suit of clothes or other articles of personal property. But, further, it is to be considered that the security of this lien, such as it is, is superadded to the holder's right to recover for his services by action."

<sup>64</sup> *Young v. English*, 7 Beav. 10; *Warburton v. Edge*, 9 Sim. 508.

<sup>65</sup> *Higgins v. Scott*, 2 Barn. & Adol. 413; In *re Murray* (1867) Wkly. Notes, 190.

<sup>66</sup> "A general lien differs essentially from a particular lien in this: That, while the latter is a right which grows out of expense or service bestowed on the particular property, the former is a right to retain certain property of another on account of a general balance due from the owner." *Schouler, Pers. Prop.* § 382.

<sup>67</sup> *Sanders v. Seelye*, 128 Ill. 631, 21 N. E. 601; In *re Knapp*, 85 N. Y. 284; *Bowling Green Sav. Bank of City of New York v. Todd*, 52 N. Y. 489; *Ward v. Craig*, 87 N. Y. 550; *Finance Co. of Pennsylvania v. Charleston*,

cover collateral debts not due the attorney in his character of attorney.<sup>68</sup> This general lien exists only in favor of attorneys,<sup>69</sup> though other persons may have a special lien for services rendered on the specific property on which the lien is claimed.<sup>70</sup> Where the property is received by the attorney, not in his professional capacity, but, for example, as trustee,<sup>71</sup> or mortgagee,<sup>72</sup> the lien does not attach.<sup>73</sup> The lien extends to papers,<sup>74</sup> money,<sup>75</sup> and property<sup>76</sup> of all kinds,

C. & C. R. Co. (C. C.) 46 Fed. 426; *McPherson v. Cox*, 96 U. S. 404, 24 L. Ed. 746; *In re Wilson* (D. C.) 12 Fed. 235; *Howard v. Town of Osceola*, 22 Wis. 453; *Chappell v. Cady*, 10 Wis. 111; *Stewart v. Flowers*, 44 Miss. 513, 7 Am. Rep. 707; *Weed Sewing Mach. Co. v. Boutelle*, 56 Vt. 570, 48 Am. Rep. 821; *Hurlbert v. Brigham*, 56 Vt. 368; *In re Paschal*, 10 Wall. 483, 19 L. Ed. 992; *Ex parte Sterling*, 16 Ves. 258. A lien on papers for professional compensation does not exist in Pennsylvania. *Du Bois' Appeal*, 38 Pa. 231, 80 Am. Dec. 478; *Walton v. Dickerson*, 7 Pa. 376. A lien for a general balance has been denied. *McDonald v. Napier*, 14 Ga. 89; *Waters v. Grace*, 23 Ark. 118; *Pope v. Armstrong*, 3 Smedes & M. (Miss.) 214; *Cage v. Wilkinson*, 3 Smedes & M. (Miss.) 223.

<sup>68</sup> *Whart. Ag.* 625. It covers a stipulated fee in another case. *Randolph v. Randolph*, 34 Tex. 181.

<sup>69</sup> A real estate broker has no lien on papers in his hands. *Arthur v. Sylvester*, 105 Pa. 233. Nor an auctioneer. *Sanderson v. Bell*, 2 Crompt. & M. 304.

<sup>70</sup> *Hollis v. Claridge*, 4 Taunt. 807; *Sanderson v. Beil*, 2 Crompt. & M. 304.

<sup>71</sup> *Rex v. Sankey*, 6 Nev. & M. 839; *Ex parte Newland*, 4 Ch. Div. 515.

<sup>72</sup> *Pelly v. Wathen*, 7 Hare, 351, 18 Law J. Ch. 281.

<sup>73</sup> *Worrall v. Johnson*, 2 Jac. & W. 214, 218; *Sanders v. Seelye*, 128 Ill. 631, 21 N. E. 601; *Stevenson v. Blakelock*, 1 Maule & S. 535.

<sup>74</sup> *St. John v. Diefendorf*, 12 Wend. (N. Y.) 261; *Hooper v. Welch*, 43 Vt. 169, 5 Am. Rep. 267; *In re Knapp*, 85 N. Y. 284; *Bowling-Green Sav. Bank of City of New York v. Todd*, 52 N. Y. 489; *In re Wilson* (D. C.) 12 Fed. 235; *Weed Sewing Mach. Co. v. Boutelle*, 56 Vt. 570, 48 Am. Rep. 821; *Redfern v. Sowerby*, 1 Swanst. 84. An attorney has no lien on his client's will. *Balch v. Symes*, 1 Turn. & R. 87. Nor to public records or court files. *Clifford v. Turrill*, 2 De Gex & S. 1; *Prichard v. Fulmer* (N. M.) 159 Pac. 39; *Kraus v. Century Gas & Electric Fixture Co.*, 161 App. Div. 916, 145 N. Y. Supp. 1086.

<sup>75</sup> *Dowling v. Eggemann*, 47 Mich. 171, 10 N. W. 187; *Bowling-Green Sav. Bank of City of New York v. Todd*, 52 N. Y. 489. *In re Knapp*, 85 N. Y. 284; *Ward v. Craig*, 87 N. Y. 550; *In re Paschal*, 10 Wall. 483, 19 L. Ed. 992; *Lewis v. Kinealy*, 2 Mo. App. 33; *Diehl v. Friester*, 37 Ohio St. 473; *Cooke v. Thresher*, 51 Conn. 105; *Casey v. March*, 30 Tex. 180; *Hurlbert v. Brigham*, 56 Vt. 368; *Read v. Bostick*, 6 Humph. (Tenn.) 321; *Wells v. Hatch*, 43 N. H. 246; *Ormerod v. Tate*, 1 East, 464. Cf. *Lucas v. Campbell*, 88 Ill. 447. The lien exists for a stipulated fee, or to the extent of quantum meruit. *In re Knapp*, 85 N. Y. 284. The lien does not attach until the money is received, and must not be confounded with the attorney's charging lien. See post, p. 141; *Casey v. March*, 30 Tex. 180; *St. John v. Diefendorf*, 12 Wend. (N. Y.)

<sup>76</sup> As upon articles delivered to be used as evidence in the case. *Friswell v. King*, 15 Sim. 191.

belonging to the client and received by the attorney in his professional capacity. Where the attorney claims a right to retain money, it is a disputed question whether his claim rests upon the law of lien or the law of set-off.<sup>77</sup> The right to retain money has been said to be a right to defalcate rather than a right of lien.<sup>78</sup> No lien arises when it is obvious that the parties intended that there should be no lien, and, of course, the attorney may waive it. Where the contract of employment is inconsistent with the existence of a lien, as where a term of credit is provided for,<sup>79</sup> there is no lien. So the delivery of property to an attorney for a special purpose is inconsistent with the existence of a lien.<sup>80</sup> Continued possession is essential to the continued existence of the lien. Where the attorney voluntarily parts with possession, the lien is gone.<sup>81</sup> Taking other security operates as a waiver.<sup>82</sup> Payment discharges the lien. Taking the client's note does not,<sup>83</sup> unless it is received as payment.<sup>84</sup> The attorney's lien takes priority over all claims by or under the client.<sup>85</sup>

261. Fees of associate attorneys may be retained, as well as his own. *Balsbaugh v. Frazer*, 19 Pa. 95; *Jackson v. Clopton*, 66 Ala. 29; *Pritchard v. Fulmer* (N. M.) 159 Pac. 39; *Arkenburgh v. Little*, 49 App. Div. 636, 64 N. Y. Supp. 742, affirmed 176 N. Y. 511, 68 N. E. 1114, mem.

<sup>77</sup> *Wells v. Hatch*, 43 N. H. 246.

<sup>78</sup> *Du Bois' Appeal*, 38 Pa. 231, 80 Am. Dec. 478. See, also, *Balsbaugh v. Frazer*, 19 Pa. 95; *McKelvy's Appeal*, 108 Pa. 615. In *Wells v. Hatch*, 43 N. H. 246, it was called a right of set-off.

Only enough may be retained. *Matter of Birdseye*, 165 App. Div. 898, 149 N. Y. Supp. 617.

<sup>79</sup> See *Stoddard Woolen Manufactory Co. v. Huntley*, 8 N. H. 441, 31 Am. Dec. 198.

<sup>80</sup> In *re Larner*, 20 Wkly. Dig. 73; *Anderson v. Bosworth*, 15 R. I. 443, 8 Atl. 339, 2 Am. St. Rep. 910; *Balch v. Symes*, 1 Turn. & R. 92; *Lawson v. Dickenson*, 8 Mod. 306; *Ex parte Sterling*, 16 Ves. 258. But, if the property is left with him after the special purpose is accomplished the lien attaches. *Ex parte Pemberton*, 18 Ves. 282; *Bracher v. Olds*, 60 N. J. Eq. 449, 46 Atl. 770; *West v. Bacon*, 164 N. Y. 425, 58 N. E. 522.

<sup>81</sup> In *re Wilson* (D. C.) 12 Fed. 235; *Nichols v. Pool*, 89 Ill. 491; *Du Bois' Appeal*, 38 Pa. 231, 80 Am. Dec. 478; *Oakes v. Moore*, 24 Me. 214, 41 Am. Dec. 379. But not where the possession is obtained from him by force or fraud. *Dicas v. Stockley*, 7 Car. & P. 587. A lien is lost by a transfer. In *re Wilson* (D. C.) 12 Fed. 235; *Lovett v. Brown*, 40 N. H. 511.

<sup>82</sup> *Balch v. Symes*, 1 Turn. & R. 87; *Cowell v. Simpson*, 16 Ves. 275; *Watson v. Lyon*, 7 De Gex, M. & G. 288.

<sup>83</sup> *Dennett v. Cutts*, 11 N. H. 163.

<sup>84</sup> *Cowell v. Simpson*, 16 Ves. 275.

<sup>85</sup> *Schwartz v. Jenney*, 21 Hun (N. Y.) 33; *Ward v. Craig*, 87 N. Y. 550; *Ex parte Sterling*, 16 Ves. 258; *Weed Sewing Mach. Co. v. Boutelle*, 56 Vt. 570, 48 Am. Rep. 821; *Randolph v. Randolph*, 34 Tex. 181. The attorney's possession is notice of his claim. *Hutchinson v. Howard*, 15 Vt. 544; *Weed Sewing Mach. Co. v. Boutelle*, 56 Vt. 570, 48 Am. Rep. 821; In *re Wilson* (D. C.) 12 Fed. 235.

**14. CHARGING LIEN**—An attorney has an equitable lien upon a judgment or fund in court realized from his exertions. This lien is called a charging lien, and is a special, not a general, lien.

An attorney's charging lien must not be confounded with the general or retaining lien just explained. The retaining lien is strictly a common-law lien, founded upon possession. Moreover, it is a general lien, extending to all the attorney's professional charges, and not limited to charges with reference to any specific property. On the other hand, the charging lien is a special lien, and is confined to costs and fees due the attorney in the particular suit in which the judgment is recovered.<sup>86</sup> This lien is not founded on possession. There can be no possession of a judgment. "The lien which an attorney is said to have on a judgment—which is, perhaps, an incorrect expression—is merely a claim to the equitable interference of the court to have that judgment held as a security for his debt."<sup>87</sup> "Although we talk of an attorney having a lien upon a judgment, it is, in fact, only a claim or right to ask for the intervention of the court for his protection, when, having obtained judgment for his client, he finds there is a probability of the client's depriving him of his costs."<sup>88</sup> In many states this lien has been declared and regulated by statute. In others it is enforced independently of statute, and in some it does not exist at all. The statutes vary greatly in their provisions, and the decisions are conflicting, owing largely to the confusion of the two kinds of lien.<sup>89</sup>

<sup>86</sup> *Williams v. Ingersoll*, 89 N. Y. 508; *Weed Sewing Mach. Co. v. Boutelle*, 56 Vt. 570, 48 Am. Rep. 821; *St. John v. Diefendorf*, 12 Wend. (N. Y.) 261; *Phillips v. Stagg*, 2 Edw. Ch. (N. Y.) 108; *Wright v. Cobleigh*, 21 N. H. 339, 341; *McWilliams v. Jenkins*, 72 Ala. 480; *Forbush v. Leonard*, 8 Minn. 303 (Gil. 267); *Mosely v. Norman*, 74 Ala. 422; *In re Wilson* (D. C.) 12 Fed. 235; *Hall v. Laver*, 1 Hare, 571; *Lucas v. Peacock*, 9 Beav. 177; *Stephens v. Weston*, 3 Barn. & C. 535.

<sup>87</sup> *Barker v. St. Quintin*, 12 Mees. & W. 441.

<sup>88</sup> *Mercer v. Graves*, L. R. 7 Q. B. 499. "‘Lien,’ properly speaking, is a word which applies only to a chattel; ‘lien upon a judgment’ is a vague and inaccurate expression; and the words ‘equitable lien’ are intensely undefined." *Brunsdon v. Allard*, 2 El. & El. 19, 27. The lien of an attorney upon a judgment is an equitable lien. *Jones, Liens*, § 155. It is not recognized by common law, but only in equity, unless declared by statute. *Forsythe v. Beveridge*, 52 Ill. 268, 4 Am. Rep. 612; *Simmons v. Almy*, 103 Mass. 33; *Baker v. Cook*, 11 Mass. 236; *Getchell v. Clark*, 5 Mass. 309; *Potter v. Mayo*, 3 Greenl. (3 Me.) 34, 14 Am. Dec. 211; *Stone v. Hyde*, 22 Me. 318; *Hobson v. Watson*, 34 Me. 20, 56 Am. Dec. 632; *Patrick v. Leach* (C. C.) 2 McCrary, 635, 12 Fed. 661; *In re Wilson* (D. C.) 12 Fed. 235.

<sup>89</sup> See *Mechem, Ag.* (2d Ed.) § 2276.

### *What Charges Secured—Taxable Costs—Fees*

As before stated, an attorney's lien upon the fruits of a suit is limited to the services rendered and expenses incurred therein; and, although a number of separate suits involve the same question, and are argued and determined together, the fruits of one are not subject to a lien for services rendered in the others.<sup>90</sup> In some states the lien is confined to the taxed costs and the attorney's disbursements.<sup>91</sup> This was originally, perhaps, the universal rule. In other states, the lien is extended to include the fee for his services.<sup>92</sup> The lien does not extend to prospective services in the hearing of an appeal.<sup>93</sup>

### *When Lien Attaches*

The charging lien does not attach until judgment is entered, in the absence of statutory regulation.<sup>94</sup> It does not attach upon rendition of verdict. In New York and some other states, however, the statute gives a lien upon the cause of action, and in these states the lien dates from the commencement of the action.<sup>95</sup> Until the lien attaches, the parties may settle the suit without regard to the attorney.<sup>96</sup>

<sup>90</sup> *Massachusetts & Southern Const. Co. v. Gill's Creek Tp.* (C. C.) 48 Fed. 145.

<sup>91</sup> *Newbert v. Cunningham*, 50 Me. 231, 79 Am. Dec. 612; *Hooper v. Brundage*, 22 Me. 460; *Ocean Ins. Co. v. Rider*, 22 Pick. (Mass.) 210; *Wells v. Hatch*, 43 N. H. 246; *Whitcomb v. Straw*, 62 N. H. 650; *Weed Sewing Mach. Co. v. Boutelle*, 56 Vt. 570, 48 Am. Rep. 821; *Ex parte Kyle*, 1 Cal. 331; *Mansfield v. Dorland*, 2 Cal. 507; *Massachusetts & Southern Const. Co. v. Gill's Creek Tp.* (C. C.) 48 Fed. 145; *Coughlin v. New York Cent. & H. R. Co.*, 71 N. Y. 443, 27 Am. Rep. 75.

<sup>92</sup> This rule is almost universal. See 6 *Corpus Juris*, p. 771; *Mechem*, Ag. (2d Ed.) § 2278.

<sup>93</sup> *Massachusetts & Southern Const. Co. v. Gill's Creek Tp.* (C. C.) 48 Fed. 145.

<sup>94</sup> *Marshall v. Meech*, 51 N. Y. 140, 10 Am. Rep. 572; *Shank v. Shoemaker*, 18 N. Y. 489; *Sweet v. Bartlett*, 4 Sandf. (N. Y.) 661; *Rooney v. Second Ave. R. Co.*, 18 N. Y. 368; *Wright v. Wright*, 70 N. Y. 96; *Coughlin v. New York & H. R. Co.*, 71 N. Y. 443, 27 Am. Rep. 75; *Crotty v. MacKenzie*, 52 How. Prac. (N. Y.) 54; *Tullis v. Bushnell*, 65 How. Prac. (N. Y.) 465; *Sullivan v. O'Keefe*, 53 How. Prac. (N. Y.) 426; *Potter v. Mayo*, 3 Greenl. (3 Me.) 34, 14 Am. Dec. 211; *Hobson v. Watson*, 34 Me. 20, 56 Am. Dec. 632; *Hanna v. Island Coal Co.*, 5 Ind. App. 163, 31 N. E. 846, 51 Am. St. Rep. 246; *Wells v. Hatch*, 43 N. H. 246; *Hooper v. Welch*, 43 Vt. 169, 5 Am. Rep. 267; *Weed Sewing Mach. Co. v. Boutelle*, 56 Vt. 570, 48 Am. Rep. 821; *Henchey v. City of Chicago*, 41 Ill. 136; *Getchell v. Clark*, 5 Mass. 309; *Brown v. Bigley*, 3 Tenn. Ch. 618; *Kusterer v. City of Beaver Dam*, 56 Wis. 471, 14 N. W. 617, 43 Am. Rep. 725; *Courtney v. McGavock*, 23 Wis. 622; *Newbert v. Cunningham*, 50 Me. 231, 79 Am. Dec. 612; *Lamont v. Washington & G. R. Co.*, 2 Mackey 13 (D. C.) 502, 47 Am. Rep. 268.

<sup>95</sup> *Judiciary Law* (Consol. Laws, c. 30) § 475. See *In re Knapp*, 85 N. Y. 284.

<sup>96</sup> See cases cited in note 94, *supra*. It has been held that a settlement be-

*To What Lien Attaches*

The lien is on the judgment, not on the subject-matter of the action,<sup>97</sup> unless otherwise provided by statute. In a few states, however, the lien is held to extend to the property in litigation, whether real or personal.<sup>98</sup> And in some states by statute the lien attaches to the claim or cause of action.<sup>99</sup>

*Priorities—Notice*

An attorney's lien takes priority over a set-off acquired after the lien has attached,<sup>1</sup> but it is subject to the judgment debtor's right to set off demands existing at that time.<sup>2</sup> In some states the at-

fore judgment will not defeat the attorney's lien for costs and charges which are legally taxable. *Swain v. Senate*, 2 Bos. & P. (N. R.) 99; *Cole v. Bennett*, 6 Price, 15; *Morse v. Cooke*, 13 Price, 473; *Rasquin v. Knickerbocker Stage Co.*, 12 Abb. Prac. (N. Y.) 324; *Dietz v. McCallum*, 44 How. Prac. (N. Y.) 493; *Talcott v. Bronson*, 4 Paige (N. Y.) 501. See, also, *Lamont v. Washington & G. R. Co.*, 2 Mackey (13 D. C.) 502, 47 Am. Rep. 268; *Parker v. Blighton*, 32 Mich. 266; *Wright v. Hake*, 38 Mich. 525; *Courtney v. McGavock*, 23 Wis. 622. In *Howard v. Town of Osceola*, 22 Wis. 433, a discontinuance was set aside to enable the attorney to proceed to collect costs of the action and his fees.

A few cases, following early English cases, have set aside a settlement intended to cheat the attorney and allowed the latter to proceed to collect his taxable charges. *National Exhibition Co. v. Crane*, 167 N. Y. 505, 60 N. E. 768; *Swain v. Senate*, 5 Bos. & Pul. 99; *Talcott v. Bronson*, 4 Paige (N. Y.) 501; *Howard v. Town of Osceola*, 22 Wis. 453; *Jones v. Morgan*, 39 Ga. 310, 99 Am. Dec. 458. See comments in *Coughlin v. New York Cent. & H. R. Co.*, 71 N. Y. 443, 27 Am. Rep. 75.

<sup>97</sup> *McWilliams v. Jenkins*, 72 Ala. 480. No lien on lands for services respecting title. *Lee v. Winston*, 68 Ala. 402; *McWilliams v. Jenkins*, 72 Ala. 480; *Shaw v. Neale*, 6 H. L. Cas. 581; *McCullough v. Flournoy*, 69 Ala. 189; *Hershy v. Du Val*, 47 Ark. 86, 14 S. W. 469; *Humphrey v. Browning*, 46 Ill. 476, 95 Am. Dec. 446; *Stewart v. Flowers*, 44 Miss. 513; *Hanger v. Fowler*, 20 Ark. 667.

<sup>98</sup> *Hunt v. McClanahan*, 1 Heisk. (Tenn.) 503; *Perkins v. Perkins*, 9 Heisk. (Tenn.) 95; *Skaggs v. Hill* (Ky.) 14 S. W. 363 (under statute); *Fillmore v. Wells*, 10 Colo. 231, 15 Pac. 343, 3 Am. St. Rep. 567 (under statute).

<sup>99</sup> So in New York. See note 95, ante.

<sup>1</sup> *Warfield v. Campbell*, 38 Ala. 527, 82 Am. Dec. 724; *Boyle v. Boyle*, 106 N. Y. 654, 12 N. E. 709; *Caudle v. Rice*, 78 Ga. 81, 3 S. E. 7; *Pierce v. Lawrence*, 16 Lea (Tenn.) 572, 1 S. W. 204.

<sup>2</sup> *Bosworth v. Tallman*, 66 Wis. 22, 27 N. W. 404; *Id.*, 66 Wis. 533, 29 N. W. 542; *Mohawk Bank v. Burrows*, 6 Johns. Ch. (N. Y.) 317; *Porter v. Lane*, 8 Johns. (N. Y.) 357; *Nicoll v. Nicoll*, 16 Wend. (N. Y.) 446; *National Bank of Winterset v. Eyre* (C. C.) 8 Fed. 733; *Ex parte Lehman, Durr & Co.*, 59 Ala. 631; *Hurst v. Sheets*, 21 Iowa, 501; *Gager v. Watson*, 11 Conn. 168. Generally, as to effect of set-off of judgments, see *Delaney v. Miller*, 84 Hun, 244, 32 N. Y. Supp. 505; *Roberts v. Mitchell*, 94 Tenn. 277, 29 S. W. 5, 29 L. R. A. 705; *Bevins v. Albro*, 86 Hun, 590, 33 N. Y. Supp. 1079; *Field v. Maxwell*, 44 Neb. 900, 63 N. W. 62.

torney must give notice of his lien.<sup>8</sup> In others, no notice is required.<sup>4</sup> In New York, where the lien is on the cause of action, no notice is necessary.<sup>5</sup> A judgment for costs alone has been held notice of the attorney's lien.<sup>6</sup> The lien will, of course, prevail over a collusive settlement; and the attorney may recover from the opposite party the amount of his claim.<sup>7</sup>

An attorney's charging lien may be waived or lost in the same manner as a general or retaining lien.<sup>8</sup> The lien is lost by the abandonment of the case.

### *Enforcement of Lien*

The lien of an attorney upon a judgment recovered by him will be enforced according to the law of the state where the lien attached, and not according to the law of the state where the judgment is sought to be collected.<sup>9</sup> An attorney is regarded as an equitable assignee of the judgment to the extent of his lien.<sup>10</sup> He may enforce his lien by an action.<sup>11</sup> Where a fund is in court, on motion, the court will order

<sup>3</sup> *Dodd v. Brott*, 1 Minn. 270 (Gil. 205), 66 Am. Dec. 541; *Hurst v. Sheets*, 21 Iowa, 501; *Marshall v. Meech*, 51 N. Y. 140, 10 Am. Rep. 572.

<sup>4</sup> *Gammon v. Chandler*, 30 Me. 152; *Hobson v. Watson*, 34 Me. 20, 56 Am. Dec. 632; *Newbert v. Cunningham*, 50 Me. 231, 79 Am. Dec. 612; *Weeks v. Wayne Circuit Judges*, 73 Mich. 256, 41 N. W. 269.

<sup>5</sup> *Albert Palmer Co. v. Van Orden*, 64 How. Prac. (N. Y.) 79; *Coster v. Green Point Ferry Co.*, 5 N. Y. Civ. Proc. R. 146; *Goodrich v. McDonald*, 41 Hun (N. Y.) 235. An attorney's lien for compensation attaches to the judgment in the hands of an assignee for value without notice. *Guliano v. Whitenack*, 9 Misc. Rep. 562, 30 N. Y. Supp. 415.

<sup>6</sup> *Marshall v. Meech*, 51 N. Y. 140, 10 Am. Rep. 572; *McGregor v. Comstock*, 28 N. Y. 237; *Haight v. Holcomb*, 16 How. Prac. (N. Y.) 173; *Stratton v. Hussey*, 62 Me. 286.

<sup>7</sup> *Whart. Ag.* § 627; *McGregor v. Comstock*, 28 N. Y. 237; *McKenzie v. Wardwell*, 61 Me. 136; *Pleasants v. Kortrecht*, 5 Heisk. (Tenn.) 694; *Foot v. Tewksbury*, 2 Vt. 97; *Currier v. Boston & M. Railroad Co.*, 37 N. H. 223; *Read v. Dupper*, 6 Term R. 361. Effect of compromise and settlement by parties. *Sheedy v. McMurtry*, 44 Neb. 499, 63 N. W. 21; *Keane v. Keane*, 86 Hun, 159, 33 N. Y. Supp. 250; *Parsons v. Hawley*, 92 Iowa, 175, 60 N. W. 520; *Roberts v. Union El. R. Co.*, 84 Hun, 437, 32 N. Y. Supp. 387; *Voigt Brewery Co. v. Donovan*, 103 Mich. 190, 61 N. W. 343; *Crouch v. Hoyt* (Sup.) 30 N. Y. Supp. 406; *Canary v. Russell*, 10 Misc. Rep. 597, 31 N. Y. Supp. 291; *Mosely v. Jamison*, 71 Miss. 456, 14 South. 529; *Foster v. Danforth* (C. C.) 59 Fed. 750.

<sup>8</sup> See ante, p. 140. See *Matter of Dunn*, 205 N. Y. 398, 98 N. E. 914, Ann. Cas. 1913E, 536.

<sup>9</sup> *Citizens' Nat. Bank v. Culver*, 54 N. H. 327, 20 Am. Rep. 134.

<sup>10</sup> *Jones, Liens*, § 232; *Newbert v. Cunningham*, 50 Me. 231, 79 Am. Dec. 612; *Mosely v. Norman*, 74 Ala. 422; *Ex parte Lehman, Durr & Co.*, 59 Ala. 631; *Woods v. Verry*, 4 Gray (Mass.) 357; *Marshall v. Meech*, 51 N. Y. 140, 10 Am. Rep. 572.

<sup>11</sup> *Ray v. Hixon*, 107 Ga. 768, 33 S. E. 692; *Hubbard v. Ellithorpe*, 135



payment to the attorney out of the fund.<sup>12</sup> The lien continues and may be enforced, though the client's debt secured by it is barred by the statute of limitations.<sup>13</sup>

## SAME—CONFIDENTIAL COMMUNICATIONS

15. An attorney cannot be compelled and will not be permitted to disclose confidential communications made to him by his client, except—

EXCEPTIONS—(a) Where the communications relate to the proposed commission of a crime.

(b) Where the disclosure is necessary to the attorney's protection.

Communications made to an attorney by his client for the purpose of obtaining his advice and assistance are privileged; that is to say, the attorney will not be compelled or permitted to disclose them. This privilege rests on reasons of public policy, growing out of the confidential character of the relation, and the necessity the client is under of making full disclosure to enable the attorney to successfully conduct his cause.<sup>14</sup> The existence of the relation of attorney and client is essential to the existence of the privilege.<sup>15</sup> A formal retainer

Iowa, 259, 112 N. W. 796, 124 Am. St. Rep. 271; *Fischer-Hansen v. Brooklyn Heights R. Co.*, 173 N. Y. 492, 66 N. E. 395.

As to the form of the action there is considerable conflict. *Mechem, Ag.* (2d Ed.) § 2283.

In some states a summary proceeding by petition is allowed. *Standidge v. Chicago R. Co.*, 254 Ill. 524, 98 N. E. 963, 40 L. R. A. (N. S.) 529, Ann. Cas. 1913C, 65; *Smith v. Acker Process Co.*, 102 App. Div. 170, 92 N. Y. Supp. 351.

The courts have also allowed the original action to be continued by the attorney. *Young v. Renshaw*, 102 Mo. App. 173, 76 S. W. 701; *Heavenrich v. Alpena Circuit Judge*, 111 Mich. 163, 69 N. W. 226; *Matter of Evans*, 58 App. Div. 502, 69 N. Y. Supp. 482.

All three proceedings have been allowed in New York. See *Smith v. Acker Process Co.*, *supra*.

<sup>12</sup> *Walker v. Floyd*, 30 Ga. 237; *Smith v. Goode*, 29 Ga. 185; *Gill v. Truelsen*, 39 Minn. 373, 40 N. W. 254.

<sup>13</sup> *Higgins v. Scott*, 2 Barn. & Adol. 413.

<sup>14</sup> *Hatton v. Robinson*, 14 Pick. (Mass.) 416, 25 Am. Dec. 415; *Crosby v. Berger*, 11 Paige (N. Y.) 377, 42 Am. Dec. 117; *Coveney v. Tannahill*, 1 Hill (N. Y.) 33, 37 Am. Dec. 287; *Bank of Utica v. Mersereau*, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189; *Williams v. Fitch*, 18 N. Y. 551; *Britton v. Lorenz*, 45 N. Y. 51; *Thompson v. Kilborne*, 28 Vt. 750, 67 Am. Dec. 742; *Hunter v. Watson*, 12 Cal. 363, 73 Am. Dec. 543. See *Mechem, Ag.* (2d Ed.) § 2297.

<sup>15</sup> *Mechem, Ag.* (2d Ed.) § 2308; *Rochester City Bank v. Suydam*, 5 How. Prac. (N. Y.) 254; *Earle v. Grout*, 46 Vt. 113; *Randolph v. Quidnick Co.* (C. C.) 23 Fed. 278; *House v. House*, 61 Mich. 69, 27 N. W. 658, 1 Am. St. Rep. 570;

or the payment of a fee is not necessary,<sup>16</sup> however, and communications in anticipation of employment are privileged.<sup>17</sup> But communications made to an attorney, not in his professional capacity, but as a friend, are not privileged.<sup>18</sup> Of course, if the person to whom the communication is made is not an attorney, the relation of attorney and client cannot exist, and the communication is not privileged.<sup>19</sup> The privilege extends, however, to communications made to interpreters, agents, and attorney's clerks.<sup>20</sup> It is also essential to the existence of the privilege that the communication be confidential. Thus, communications made openly in the presence of others,<sup>21</sup> or made for the purpose of being communicated by the attorney to others,<sup>22</sup> are not

*Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, 131; *Brayton v. Chase*, 3 Wis. 456; *Granger v. Warrington*, 3 Gilman (Ill.) 299; *Rockford v. Falver*, 27 Ill. App. 604; *Bogert v. Bogert*, 2 Edw. Ch. (N. Y.) 399; *Parker v. Carter*, 4 Munf. (Va.) 273, 6 Am. Dec. 513.

<sup>16</sup> *Bacon v. Frisbie*, 80 N. Y. 394, 36 Am. Rep. 627; *March v. Ludlum*, 3 Sandf. Ch. (N. Y.) 35; *Foster v. Hall*, 12 Pick. (Mass.) 89, 22 Am. Dec. 400; *Beltzhoover v. Blackstock*, 3 Watts (Pa.) 20, 27 Am. Dec. 330; *Cross v. Riggins*, 50 Mo. 335. Cf. *Thompson v. Kilborne*, 28 Vt. 750, 67 Am. Dec. 742; *Cuts v. Pickering*, 1 Vent. 197.

<sup>17</sup> *Bacon v. Frisbie*, 80 N. Y. 394, 36 Am. Rep. 627; *Thorp v. Goewey*, 85 Ill. 611; *Orton v. McCord*, 33 Wis. 205; *Cross v. Riggins*, 50 Mo. 335; *Young v. State*, 65 Ga. 525; *Bean v. Quimby*, 5 N. H. 94.

<sup>18</sup> 1 Greenl. Ev. § 244; *Goltra v. Wolcott*, 14 Ill. 89; *Cady v. Walker*, 62 Mich. 157, 28 N. W. 805, 4 Am. St. Rep. 834; *Hoffman v. Smith*, 1 Caines (N. Y.) 157. There is no privilege where an attorney is employed as a mere scrivener or conveyancer. *House v. House*, 61 Mich. 69, 27 N. W. 858, 1 Am. St. Rep. 570; *Hebbard v. Haughian*, 70 N. Y. 54; *Smith v. Long*, 106 Ill. 485; *De Wolf v. Strader*, 26 Ill. 225, 79 Am. Dec. 371; *Hatton v. Robinson*, 14 Pick. (Mass.) 416, 25 Am. Dec. 415; *Appeal of Goodwin Gas Stove & Meter Co.*, 117 Pa. 514, 12 Atl. 736, 2 Am. St. Rep. 686. Contra, *Getzlaff v. Seliger*, 43 Wis. 297; *Parker v. Carter*, 4 Munf. (Va.) 273, 6 Am. Dec. 513. See, generally, *Brown v. Jewett*, 120 Mass. 215; *Johnson v. Davenport*, 19 Johns. (N. Y.) 134, 10 Am. Dec. 198; *Clark v. Richards*, 3 E. D. Smith (N. Y.) 89.

<sup>19</sup> *McLaughlin v. Gilmore*, 1 Ill. App. 563; *Holman v. Kimball*, 22 Vt. 555; *Sample v. Frost*, 10 Iowa, 266; *Barnes v. Harris*, 7 Cush. (Mass.) 576, 54 Am. Dec. 734. The rule applies only to licensed attorneys. *Holman v. Kimball*, 22 Vt. 555. Cf. *Benedict v. State*, 44 Ohio St. 679, 11 N. E. 125, where it was held communications to a person regularly practicing in a justice court, but who was not an attorney, were privileged.

<sup>20</sup> *Foster v. Hall*, 12 Pick. (Mass.) 89, 22 Am. Dec. 400.

<sup>21</sup> *Mobile & M. R. Co. v. Yeates*, 67 Ala. 167; *Jackson ex dem. Haverly v. French*, 3 Wend. (N. Y.) 337, 20 Am. Dec. 699; *House v. House*, 61 Mich. 69, 27 N. W. 858, 1 Am. St. Rep. 570; *Gallagher v. Williamson*, 23 Cal. 331, 83 Am. Dec. 114; *Hartford Fire Ins. Co. v. Reynolds*, 36 Mich. 502; *Hughes v. Boone*, 102 N. C. 137, 9 S. E. 286; *Baumann v. Steingester*, 213 N. Y. 328, 107 N. E. 578, Ann. Cas. 1915C, 1071.

<sup>22</sup> *Henderson v. Terry*, 62 Tex. 281; *Ripon v. Davies*, 2 Nev. & M. 310; *Hughes v. Boone*, 102 N. C. 137, 9 S. E. 286; *Cady v. Walker*, 62 Mich. 157, 28

privileged. But a special injunction of secrecy is not essential to the privilege, and it attaches though the client was unaware of it.<sup>23</sup> The privilege does not apply to collateral facts involving no matter of confidence, such as the fact of his employment,<sup>24</sup> the name of his client,<sup>25</sup> and the like.<sup>26</sup> The communication must have been made by the client to the attorney. Where it is made to third persons and overheard by the attorney,<sup>27</sup> or where he derives information by observation<sup>28</sup> or from third persons,<sup>29</sup> it is not privileged. The privilege is for the benefit of the client, not the attorney. It continues until waived by the client.<sup>30</sup> It is not waived merely by making the attorney a

N. W. 805, 4 Am. St. Rep. 834; *Bartlett v. Bunn*, 56 Hun, 507, 10 N. Y. Supp. 210; *White v. State*, 86 Ala. 69, 5 South. 674.

<sup>23</sup> *McLellan v. Longfellow*, 32 Me. 494, 54 Am. Dec. 599; *Wheeler v. Hill*, 16 Me. 329.

<sup>24</sup> *White v. State*, 86 Ala. 69, 5 South. 674; *Mobile & M. R. Co. v. Yeates*, 67 Ala. 164; *Leindecker v. Waldron*, 52 Ill. 283; *Gower v. Emery*, 18 Me. 79; *Chirac v. Reinicker*, 11 Wheat. 280, 6 L. Ed. 474; *Forshaw v. Lewis*, 1 Jur. (N. S.) 263.

<sup>25</sup> *Fulton v. Maccracken*, 18 Md. 528, 81 Am. Dec. 620; *Levy v. Pope*, 1 Moody & M. 410.

<sup>26</sup> *Wheatley v. Williams*, 1 Mees. & W. 536; *Brown v. Payson*, 6 N. H. 443; *In re Austin's Will*, 42 Hun (N. Y.) 516; *Burnside v. Terry*, 51 Ga. 186; *Hebbard v. Haughian*, 70 N. Y. 54; *House v. House*, 61 Mich. 69, 27 N. W. 858, 1 Am. St. Rep. 570; *Cady v. Walker*, 62 Mich. 157, 28 N. W. 805, 4 Am. St. Rep. 834. An attorney may be asked whether he has in his possession a certain paper, in order to lay a foundation for the admission of secondary evidence as to its contents. *Coveney v. Tannahill*, 1 Hill (N. Y.) 33, 37 Am. Dec. 287; *Jackson ex dem. Neilson v. M'Vey*, 18 Johns. (N. Y.) 330. But he cannot be compelled to produce it or state its contents. *Id.*; *King v. Ashley*, 179 N. Y. 281, 72 N. E. 106; *Temple v. Phelps*, 193 Mass. 297, 79 N. E. 482; *Kramer v. Kister*, 187 Pa. 227, 40 Atl. 1008, 44 L. R. A. 432; *Bronston's Adm'r v. Bronston's Heirs*, 141 Ky. 639, 133 S. W. 584.

<sup>27</sup> *House v. House*, 61 Mich. 69, 27 N. W. 859, 1 Am. St. Rep. 570.

<sup>28</sup> *Crosby v. Berger*, 11 Paige (N. Y.) 377, 42 Am. Dec. 117; *Brandt ex dem. Van Cortlandt v. Klein*, 17 Johns. (N. Y.) 335; *Chillicothe Ferry, Road & Bridge Co. v. Jameson*, 48 Ill. 281; *Stoney v. M'Neil, Harp.* (S. C.) 557, 18 Am. Dec. 600.

<sup>29</sup> *Crosby v. Berger*, 11 Paige (N. Y.) 377, 42 Am. Dec. 117; *Hunter v. Watson*, 12 Cal. 363, 73 Am. Dec. 543; *Gallagher v. Williamson*, 23 Cal. 331, 83 Am. Dec. 114.

<sup>30</sup> *Mechem, Ag.* (2d Ed.) § 2311; *Hatton v. Robinson*, 14 Pick. (Mass.) 416, 25 Am. Dec. 415. The client may waive. *Chase's Case*, 1 Bland (Md.) 206, 17 Am. Dec. 277; *Parker v. Carter*, 4 Munf. (Va.) 273, 6 Am. Dec. 513; *Whiting v. Barney*, 30 N. Y. 330, 86 Am. Dec. 385; *Benjamin v. Coventry*, 19 Wend. (N. Y.) 353; *Bank of Utica v. Mersereau*, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189; *Fossler v. Schriber*, 38 Ill. 172; *Passmore v. Passmore*, 50 Mich. 626, 16 N. W. 170, 45 Am. Rep. 35; *Hamilton v. People*, 29 Mich. 173; *Foster v. Hall*, 12 Pick. (Mass.) 89, 22 Am. Dec. 400.

A few cases have allowed waiver by representative. *Phillips v. Chase*, 201

witness, but it is waived if the client examines him as to the privileged transactions.<sup>31</sup>

### *Exceptions*

"Professional communications are not privileged when such communications are for an unlawful purpose, having for their object the commission of a crime. They then partake of the nature of a conspiracy, or attempted conspiracy; and it is not only lawful to divulge such communications, but, under such circumstances, it might become the duty of the attorney to do so. \* \* \* The relation of attorney and client cannot exist for the purpose of counsel in concocting crimes. The privilege does not exist in such cases."<sup>32</sup> This exception applies only to contemplated crimes. Communications with reference to completed crimes are privileged.<sup>33</sup> It is an essential element of the right to be defended by counsel. The exception is also confined to crimes, as distinguished from mere civil frauds.<sup>34</sup> A second exception exists where the disclosure is necessary to the protection of the attorney's own rights, as where he sues or is sued by his client, and it becomes material to show the nature of his employment or the instructions of the client.<sup>35</sup>

Mass. 444, 87 N. E. 755, 131 Am. St. Rep. 406; *Fossler v. Schriber*, 38 Ill. 172; *Le Prohon's Appeal*, 102 Me. 445, 67 Atl. 317, 10 Ann. Cas. 1115. *Contra*: *Westover v. Aetna Ins. Co.*, 99 N. Y. 56, 1 N. E. 104, 52 Am. Rep. 1.

<sup>31</sup> *Vaillant v. Dodemead*, 2 Atk. 524; *Waldron v. Ward*, Style, 449.

<sup>32</sup> *People v. Van Alstine*, 57 Mich. 69, 23 N. W. 594. See, also, *Coveney v. Tannahill*, 1 Hill (N. Y.) 33, 37 Am. Dec. 287; *Bank of Utica v. Mersereau*, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189; *State v. Mewherter*, 46 Iowa, 88; *Dudley v. Beck*, 3 Wis. 274; *Graham v. People*, 63 Barb. (N. Y.) 468; *Clay v. Williams*, 2 Munf. (Va.) 105, 5 Am. Dec. 453; *Tyler v. Tyler*, 126 Ill. 525, 21 N. E. 616, 9 Am. St. Rep. 642; *People v. Farmer*, 194 N. Y. 251, 87 N. E. 457.

<sup>33</sup> 1 Greenl. Ev. § 240; *Alexander v. U. S.*, 138 U. S. 353, 11 Sup. Ct. 350, 34 L. Ed. 954.

<sup>34</sup> *Bank of Utica v. Mersereau*, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189; *Maxham v. Place*, 46 Vt. 434. *Contra*: *Hamil v. England*, 50 Mo. App. 338; *Matthews v. Hoagland*, 48 N. J. Eq. 455, 21 Atl. 1054; *Lanum v. Patterson*, 151 Ill. App. 36; *Queen v. Bullivant*, [1900] 2 Q. B. 163. The tendency is to overrule the earlier cases.

<sup>35</sup> *Nave v. Baird*, 12 Ind. 318; *Mitchell v. Bromberger*, 2 Nev. 345, 90 Am. Dec. 550; *Rochester City Bank v. Suydam*, 5 How. Prac. (N. Y.) 254.

## 16. TERMINATION

The relation of attorney and client may be terminated in any of the ways in which any other agency may be terminated.<sup>36</sup> But the court may interfere to do justice between them. The attorney of record cannot be changed without leave of court,<sup>37</sup> and an attorney can withdraw only by leave of court.<sup>38</sup>

<sup>36</sup> Death of client. *Adams v. Nellis*, 59 How. Prac. (N. Y.) 385. Unless coupled with an interest. *Villhauer v. City of Toledo*, 32 Wkly. Law Bul. 154; *Harness v. State ex rel. Platt*, 57 Ind. 1; *Lapaugh v. Wilson*, 43 Hun (N. Y.) 619; *Clegg v. Baumberger*, 110 Ind. 536, 9 N. E. 700. A client has the right, without assigning any reason therefor, to change his attorney at any time on paying or securing the attorney's fees. *In re Prospect Ave.*, 85 Hun, 257, 32 N. Y. Supp. 1013. See *Mechem*, Ag. (2d Ed.) § 2314; *Matter of Dunn*, 205 N. Y. 398, 98 N. E. 914, Ann. Cas. 1913E, 536.

<sup>37</sup> *Krekeler v. Thaule*, 49 How. Prac. (N. Y.) 138; *Ginders v. Moore*, 1 Barn. & C. 654; *Boeram v. Jerome*, 1 Wend. (N. Y.) 293. A substitution will not be permitted unless the costs of the first attorney have been paid. *Witt v. Ames*, 11 Wkly. Rep. 751, 8 Law T. (N. S.) 425; *Matter of Dunn*, *supra*.

<sup>38</sup> *U. S. v. Curry*, 6 How. 106, 12 L. Ed. 363; *Boyd v. Stone*, 5 Wis. 240.

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# FACTORS

1. Factor Defined.
2. Establishment of Relation.
- 3-4. Implied Powers of Factors.
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17. Rights against Third Persons.
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19. Rights and Liabilities of Principals and Third Persons.
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## FACTOR DEFINED

1. A factor or commission merchant is an agent who makes a business of receiving and selling consignments of goods, usually in his own name.

A factor is "an agent employed to sell goods or merchandise consigned or delivered to him by or for his principal for a compensation, commonly called 'factorage' or 'commission.'"<sup>1</sup> The term "commission merchant," as used in common parlance, means the same as the legal term "factor."<sup>2</sup> Possession of the goods with which the factor deals, and authority to sell them, are essential to the character of a factor. A factor is distinguished from a broker chiefly by the fact that he has possession of the goods, while the broker does not; and that the factor usually sells in his own name, while the broker usually

<sup>1</sup> Whart. Ag. § 735. A factor may receive a salary instead of a commission. *State ex rel. Parker v. Thompson*, 120 Mo. 12, 25 S. W. 346; *Story, Ag. § 33*; *Mechem, Ag. (2d Ed.) § 2497*; *Civ. Code Cal. § 2026*; *Civ. Code Dak. 1877, § 1168*.

<sup>2</sup> *Brickell, J., in Perkins v. State*, 50 Ala. 154, 156; *Cooper Rubber Co. v. Johnson*, 133 Tenn. 562, 182 S. W. 593, L. R. A. 1917A, 282.

deals in the name of his principal.<sup>3</sup> In some cases the term "factor" has been applied to agents to purchase goods;<sup>4</sup> but this use of the word seems improper. A factor really means nothing except an agent to sell goods, though the factor may perform other duties for his principal in addition to those he performs as factor.<sup>5</sup> One who purchases goods for a principal is really a broker.

### ESTABLISHMENT OF RELATION

#### 2. The relation of principal and factor is established by original grant of authority or by ratification.

For the establishment of the relation of principal and factor, the same rules are applicable as in ordinary cases of agency. It may arise by an express contract of the parties; it may be implied from their acts; or the principal may ratify the acts of an unauthorized factor.

### IMPLIED POWERS OF FACTORS

#### 3. A factor has the following implied powers:

- (a) To sell in his own name.
- (b) To fix the price.
- (c) To sell on credit.
- (d) To warrant.
- (e) To receive payment.
- (f) To insure.

#### 4. A factor has no implied power:

- (a) To barter.
- (b) To pledge, unless authorized by statute.
- (c) To delegate his authority.
- (d) To settle except for payment in full.

A factor is bound to conform to the instructions of his consignor as to the price of the article to be sold, the terms, the mode of pay-

<sup>3</sup> *Baring v. Corrie*, 2 Barn. & Ald. 137; *Harbert v. Neill*, 49 Tex. 143; *Sala-din v. Mitchell*, 45 Ill. 79; *Higgins v. Moore*, 34 N. Y. 417; *Slack v. Tucker*, 23 Wall. 321, 23 L. Ed. 143; *Sinclair & Co. v. National Surety Co.*, 132 Iowa, 549, 107 N. W. 181.

<sup>4</sup> *Bryce v. Brooks*, 26 Wend. 367; *Stevens v. Robins*, 12 Mass. 180.

<sup>5</sup> See *Patterson v. Leake*, 5 La. Ann. 547; *Emerson v. Manufacturing Co.*, 12 Mass. 237. One who takes milk from farmers, manufactures it into butter and cheese, and sells the product, deducting a certain compensation per pound, is a factor. *First Nat. Bank of Elgin v. Schween*, 127 Ill. 573, 20 N. E. 681, 11 Am. St. Rep. 174. Where several owners of a vessel and cargo



ment, etc.<sup>6</sup> But, in the absence of any instructions, the consignor is presumed by law to be acquainted with and to assent to the course of dealing which is usually practiced at the same market by others in the same line of business.<sup>7</sup> A person who deals in a particular market must be taken to deal according to the known, general, and uniform custom or usage of that market; and he who employs another to act for him at a particular place or market must be taken as intending that the business to be done will be done according to the usage and custom of that place or market, whether the principal in fact knew of the usage or custom or not.<sup>8</sup>

constitute one of their number to transact the business connected with the property, he is viewed as a factor. *Bradford v. Kimberly*, 3 Johns. Ch. (N. Y.) 431. The captain of a steamboat, selling flour on freight, will not be considered a factor without express authority, or such as is implied by the usages of trade. *Taylor v. Wells*, 3 Watts (Pa.) 65; *Rapp v. Palmer*, 3 Watts (Pa.) 178. Where a person employs another to sell goods and wares at a distant place, agrees that the employé shall receive a certain sum yearly and a stipulated portion of the profits for his services, and the employé is to select and rent a business house, and employ clerks, and conduct the business, and all rents and expenses are to be paid out of the proceeds, if sufficient, but, if not, then by the employer, the person conducting the business is a factor. *Winne v. Hammond*, 37 Ill. 99; *Blood v. Palmer*, 11 Me. 414, 26 Am. Dec. 547. A common carrier may occupy the position of a factor by selling the goods he has transported for the shipper, at the place of destination. *Kemp v. Coughtry*, 11 Johns. (N. Y.) 107; *Williams v. Nichols*, 13 Wend. (N. Y.) 58; *Harrington v. McShane*, 2 Watts (Pa.) 443, 27 Am. Dec. 321; *Taylor v. Wells*, 3 Watts (Pa.) 65.

See, also, *Sutton & Cummins v. Kiel Cheese & Butter Co.*, 155 Ky. 465, 159 S. W. 950; *McGaw v. Hanway*, 120 Md. 197, 87 Atl. 666, Ann. Cas. 1915A, 601; *Hamilton Machine Tool Co. v. Mechanics' Mach. Co.*, 179 Ill. App. 145.

<sup>6</sup> *Van Alen v. Vanderpool*, 6 Johns. (N. Y.) 70, 5 Am. Dec. 192; *Douglass v. Leland*, 1 Wend. (N. Y.) 490; *Goodenow v. Tyler*, 7 Mass. 36, 5 Am. Dec. 22; *Day v. Holmes*, 103 Mass. 306; *Cotton v. Hiller*, 52 Miss. 7; *Hall v. Storrs*, 7 Wis. 258; *Osborne, D. M. & Co. v. Rider*, 62 Wis. 235, 22 N. W. 394. The factor must sell within a reasonable time after the goods are received. *Atkinson v. Burton*, 4 Bush (Ky.) 299. As to the place of sale, see *Phillips v. Scott*, 43 Mo. 86, 97 Am. Dec. 369; *Kauffman v. Beasley*, 54 Tex. 563; *Wallace v. Bradshaw*, 6 Dana (Ky.) 382; *Grieff v. Cowguill*, 2 Disn. (Ohio) 58. Where a consignment is made to a commission merchant for sale without instruction, in the absence of an established usage to the contrary, of which the consignor has or must be presumed to have knowledge, the consignee's authority to sell is limited to the place to which the consignment was originally made. *Burke v. Frye*, 44 Neb. 223, 62 N. W. 476.

<sup>7</sup> *Dwight v. Whitney*, 15 Pick. (Mass.) 179; *Randall v. Kehlror*, 60 Me. 37, 11 Am. Rep. 169; *Kauffman v. Beasley*, 54 Tex. 563.

<sup>8</sup> *Bailey v. Bensley*, 87 Ill. 556; *Story*, Ag. §§ 60, 96, 199; 1 Chit. Cont. (11th Am. Ed.) 83; *Sutton v. Tatham*, 10 Adol & E. 27; *Bayliffe v. Butterworth*, 1 Welsb. H. & G. 428; *Lyon v. Culbertson*, 83 Ill. 33, 25 Am. Rep. 349; *United States Life Ins. Co. v. Advance Co.*, 80 Ill. 549; *Andrews v. Kneeland*, 6 Cow. (N. Y.) 354.

### *To Sell in His Own Name*

Among the implied powers of a factor is the power to sell goods consigned to him in his own name, without disclosing his principal.<sup>9</sup> This, as already stated, is one of the chief tests in distinguishing a factor from a broker.<sup>10</sup>

### *To Fix the Price*

The consignment of goods to a factor for sale, without special instructions as to the price for which he shall sell, confers upon him the right to use his own judgment as to what offers to accept, and the probable changes in the market.<sup>11</sup> A sudden falling off of the market after the goods are received does not alter the case, and the factor may sell without waiting for instructions.<sup>12</sup> He may even sell for less than the amount he has advanced to the principal on the goods, and recover the difference from the principal.<sup>13</sup> The principal may, of course, fix the price, and then the factor must follow his instructions.<sup>14</sup>

### *To Sell on Credit*

A factor has implied power to sell goods on a reasonable term of credit.<sup>15</sup> He must, however, exercise the care that a reasonably prudent business man would use, and not extend credit to irresponsible persons.<sup>16</sup> A factor, however, has no authority to give credit when

<sup>9</sup> *Graham v. Duckwall*, 8 Bush (Ky.) 12; *Johnston v. Usborne*, 11 Adol. & E. 549.

<sup>10</sup> *Baring v. Corrie*, 2 Barn. & Ald. 137; ante, p. 151.

<sup>11</sup> *Adams v. Capron*, 21 Md. 186, 83 Am. Dec. 566; *Conway v. Lewis*, 120 Pa. 215, 13 Atl. 826, 6 Am. St. Rep. 700; *Given v. Lemoine*, 35 Mo. 110; *Justice v. Brock*, 21 Wyo. 281, 133 Pac. 70; *Cleveland & Sons v. Jamison* (Tex. Civ. App.) 182 S. W. 1175.

<sup>12</sup> *Adams v. Capron*, supra.

<sup>13</sup> *Given v. Lemoine*, supra.

<sup>14</sup> See post, p. 165. Letters of instruction from a merchant to his factor, accompanying a consignment of goods, not expressly fixing the minimum price of the goods, but merely expressing an expectation that the goods, on account of their superior quality, would readily command a certain price named, will not be construed as fixing the minimum price; and if the factor sell for a less price than the one named, in good faith and without negligence, he will not be liable in damages. *Vianna v. Barclay*, 3 Cow. (N. Y.) 281.

But instructions not binding on third person without notice. *Smith v. Jefferson Bank*, 147 Mo. App. 461, 126 S. W. 810.

<sup>15</sup> *Van Alen v. Vanderpool*, 6 Johns. (N. Y.) 69; *Robertson v. Livingston*, 5 Cow. (N. Y.) 473; *Goodenow v. Tyler*, 7 Mass. 36, 5 Am. Dec. 22; *Hapgood v. Batcheller*, 4 Metc. (Mass.) 576; *McConnico v. Curzen*, 2 Call (Va.) 358, 1 Am. Dec. 540; *Pinkham v. Crocker*, 77 Me. 563, 1 Atl. 827.

<sup>16</sup> *Pinkham v. Crocker*, 77 Me. 563, 1 Atl. 827; *James v. McCredie*, 1 Bay (S. C.) 294, 1 Am. Dec. 617; *Brown & Son v. Funck's Estate*, 89 Kan. 601, 132 Pac. 202; Ann. Cas. 1915A, 174.

the usage of the trade is to sell for cash only.<sup>17</sup> When a factor sells on credit, he may take negotiable paper payable to himself.<sup>18</sup> If the maker of the paper becomes insolvent, the factor is not liable for the loss if he has exercised due care.<sup>19</sup> But, if the factor discounts such paper for his own accommodation, he becomes liable for any loss which occurs,<sup>20</sup> though he has implied power to discount paper for his principal.<sup>21</sup>

### *To Warrant*

The usage of trade generally gives a factor power to warrant the quality of the goods he sells.<sup>22</sup> But the warranty must be a reasonable one. Thus, it has been held that there is no implied authority to warrant that flour will keep sweet during a long sea voyage;<sup>23</sup> nor to warrant against gratuitous and unwarrantable interferences with the subject of the sale.<sup>24</sup>

### *To Receive Payment*

A factor has power to receive payment for the goods sold by him, since he is in possession and invested with all the indicia of ownership. He may receive payment at the time of the sale, or subsequently if the sale was on credit.<sup>25</sup>

<sup>17</sup> *Kauffman v. Beasley*, 54 Tex. 563; *Harbert v. Neill*, 49 Tex. 143; *Neill v. Billingsley*, Id. 161.

<sup>18</sup> *Goodenow v. Tyler*, 7 Mass. 36, 5 Am. Dec. 22; *Greely v. Bartlett*, 1 Greenl. (Me.) 172, 10 Am. Dec. 54.

But where there was a sale on credit, and, at the expiration of the term of credit, the factor took a note payable to himself, he was held personally liable. *Hosmer v. Beebe*, 2 Mart. N. S. (La.) 368.

<sup>19</sup> *Goodenow v. Tyler*, 7 Mass. 36, 5 Am. Dec. 22; *Gorman v. Wheeler*, 10 Gray (Mass.) 362; *Leach v. Beardslee*, 22 Conn. 404; *Greely v. Bartlett*, 1 Greenl. (Me.) 172, 10 Am. Dec. 54. As to the diligence he must use in collecting notes, see *Folsom v. Mussey*, 8 Greenl. (Me.) 400, 23 Am. Dec. 522. All such notes belong to the principal, and do not pass to the factor's assignee in bankruptcy. *Kip v. Bank*, 10 Johns. (N. Y.) 63; *Messier v. Amery*, 1 Yeates (Pa.) 533, 1 Am. Dec. 316; *Thompson v. Perkins*, 3 Mason, 232, Fed. Cas. No. 13,972.

<sup>20</sup> *Morris v. Wallace*, 3 Pa. 319, 45 Am. Dec. 642; *Myers v. Entriiken*, 6 Watts & S. (Pa.) 44, 40 Am. Dec. 538; *Johnson v. O'Hara*, 5 Leigh (Va.) 456.

<sup>21</sup> *Greely v. Bartlett*, 1 Greenl. (Me.) 172, 10 Am. Dec. 54.

<sup>22</sup> *Schuchardt v. Allen*, 1 Wall. 359, 17 L. Ed. 642; *Woodford v. McClenahan*, 9 Ill. (4 Gilman) 85; *Upton v. Suffolk County Mills*, 11 Cush. (Mass.) 586, 59 Am. Dec. 163; *Smith v. Tracy*, 36 N. Y. 79; *Nelson v. Cowing*, 6 Hill (N. Y.) 336; *Andrews v. Kneeland*, 6 Cow. (N. Y.) 354; *Bradford v. Bush*, 10 Ala. 386; *Hunter v. Jameson*, 28 N. C. 252. But see *Argersinger v. MacNaughton*, 114 N. Y. 535, 21 N. E. 1022, 11 Am. St. Rep. 687.

<sup>23</sup> *Upton v. Suffolk County Mills*, 11 Cush. (Mass.) 586, 59 Am. Dec. 163.

<sup>24</sup> As where whisky was sold with a warranty against seizure for violation of the revenue laws. *Palmer v. Hatch*, 46 Mo. 585.

<sup>25</sup> *Lumley v. Corbett*, 18 Cal. 494; *Rice v. Groffmann*, 56 Mo. 434; *Drinkwa-*

*To Insure*

It is the settled law that factors, having the goods of their principal in their possession, may insure them;<sup>26</sup> but they are not bound to do so, unless they have received orders to insure, or promise to insure,<sup>27</sup> or the usage of trade or the habit of dealing between them and their principal raises an obligation to insure.<sup>28</sup> And if, in any of the cases mentioned, the agent neglect to make the insurance, he is himself, by the custom of merchants, to be considered as the insurer, and liable as such in the event of loss, in which case he is entitled to credit for the premium which should have been paid.<sup>29</sup> A factor may insure in his own name;<sup>30</sup> and if he does so, and a loss occurs, he can recover the full value of the goods.<sup>31</sup>

*To Barter*

A factor has no implied power to barter or exchange the goods consigned to him for other goods. If he does so, no title to the property passes, and the principal may recover the goods, though the person dealing with the factor supposed the latter to be the owner.<sup>32</sup>

ter v. Goodwin, Cowp. 251, 256; Adams v. Fraser, 82 Fed. 211, 27 C. C. A. 108.

<sup>26</sup> *Brisban v. Boyd*, 4 Paige (N. Y.) 17; *Lee v. Adsit*, 37 N. Y. 78; *De Forest v. Fulton Fire Ins. Co.*, 1 N. Y. Super. Ct. 94; *Schaeffer v. Kirk*, 49 Ill. 251; *Shoenfeld v. Fleisher*, 73 Ill. 404. That the factor cannot insure in a mutual company, see *White v. Madison*, 26 N. Y. 117.

<sup>27</sup> *Lee v. Adsit*, 37 N. Y. 78; *Shoenfeld v. Fleisher*, 73 Ill. 404; *Ætna Ins. Co. v. Jackson*, 16 B. Mon. (Ky.) 242; *Duncan v. Bøye*, 17 La. Ann. 273.

<sup>28</sup> *Area v. Milliken*, 35 La. Ann. 1150; *Gordon v. Wright*, 29 La. Ann. 812.

<sup>29</sup> *De Tastett v. Crousillat*, 2 Wash. C. C. 132, Fed. Cas. No. 3,828; *Gordon v. Wright*, 29 La. Ann. 812; *Shoenfeld v. Fleisher*, 73 Ill. 404; *Waters v. Assurance Co.*, 5 El. & Bl. 870.

<sup>30</sup> *Brisban v. Boyd*, 4 Paige (N. Y.) 17; *Johnson v. Campbell*, 120 Mass. 449; *Sargeant v. Morris*, 3 Barn. & Ald. 377; *Upsaricha v. Noble*, 13 East, 332.

<sup>31</sup> *Brisban v. Boyd*, 4 Paige (N. Y.) 17; *Ballard v. Merchants' Ins. Co.*, 9 La. 258, 29 Am. Dec. 444. A factor who has insured his principal's goods at the latter's expense, and collected the insurance on their being damaged by fire while in his possession, is liable to his principal for the amount collected, with interest from the time payment is demanded of him, even though there was no contract between them as to insurance. *Fish v. Seeberger*, 47 Ill. App. 580, affirmed 39 N. E. 982, 154 Ill. 30. A promise by a factor that he would write to his principal to get insurance done does not bind the principal to insure. It is a personal engagement of the factor, for which the principals are not liable. *Randolph v. Ware*, 3 Cranch, 503, 2 L. Ed. 512.

<sup>32</sup> *Wheeler & Wilson Mfg. Co. v. Givan*, 65 Mo. 89; *Wing v. Neal* (Me.) 2 Atl. 881; *Guerreiro v. Peile*, 3 Barn. & Ald. 616; *Victor Sewing Mach. Co. v. Heller*, 44 Wis. 265 (under factors' act).

He may not receive anything but money. *Underwood v. Nicholls*, 17 C. B. 239; *Sangston v. Maitland*, 11 Gill & J. (Md.) 286; *Guy v. Oakley*, 13 Johns. (N. Y.) 332.

*To Pledge*

Although a factor or broker has a lien on his principal's goods for advances made, yet at common law he cannot pledge them.<sup>33</sup> When goods are so attempted to be pledged, the title and right of property of the owner are not divested by his own act, or by his authority. The factor has authority to sell, and a sale passes a good title from the owner. But the factor has no authority to pledge goods consigned to him. His acts attempting to do so are void, and vest no title in the pledgee.<sup>34</sup>

The rights of the principal and factor depend on the law merchant, which has been adopted by the common law. By this law a factor is but the attorney of his principal, and he must pursue the powers delegated to him.<sup>35</sup> The party receiving such a pledge, and advancing his money, acquires no title, as against the principal. Nor is it material in such a case whether the pledgee knew that he was dealing with a factor or not. If he knew the fact, he was bound to know that the factor had no authority to pledge the goods of his principal. If he did not know that the person with whom he was dealing was a factor, still his want of knowledge of this fact could not extend the authority of the factor. As such an act is not within the ordinary powers of a factor, it is clear that it cannot work a divestiture of the title of the principal; and he may pursue the goods in the hands of the pledgee, or may bring trover against both the pledgee and factor, or either of them.<sup>36</sup>

<sup>33</sup> *Kennedy v. Strong*, 14 Johns. (N. Y.) 128; *Rodriguez v. Hefferman*, 5 Johns. Ch. (N. Y.) 417; *Newbold v. Wright*, 4 Rawle (Pa.) 195; *Kinder v. Shaw*, 2 Mass. 398; *Gray v. Agnew*, 95 Ill. 315; *Kelly v. Smith*, 1 Blatchf. 290, Fed. Cas. No. 7,675; *Van Amringe v. Peabody*, 1 Mason, 440, Fed. Cas. No. 16,825; *Mechanics' & T. Ins. Co. v. Kiger*, 103 U. S. 352, 26 L. Ed. 433; *Warner v. Martin*, 11 How. 209, 13 L. Ed. 667; *First Nat. Bank of Macon v. Nelson*, 38 Ga. 391, 95 Am. Dec. 400; *Wright v. Solomon*, 19 Cal. 64, 79 Am. Dec. 196; *Merchants' Nat. Bank of Memphis v. Trenholm*, 12 Heisk. (Tenn.) 520; *McCreary v. Gaines*, 55 Tex. 485, 40 Am. Rep. 818; *Paterson v. Tash*, 2 Strange, 1178; *Daubigny v. Duval*, 5 Term R. 604; *Newsom v. Thornton*, 6 East, 17; *Graham v. Dyster*, 2 Starkie, 21; *Martini v. Coles*, 1 Maule & S. 140; *Shipley v. Kymer*, Id. 484; *Solly v. Rathbone*, 2 Maule & S. 298; *Cockran v. Irlam*, Id. 301, note; *Boyson v. Coles*, 6 Maule & S. 14; *Fielding v. Kymer*, 2 Brod. & B. 639; *Queiroz v. Trueman*, 3 Barn. & C. 342; *Bonito v. Mosquera*, 15 N. Y. Super. Ct. 401. But cf. *Hutchinson v. Bours*, 6 Cal. 384; *Leet v. Wadsworth*, 5 Cal. 404; *Wright v. Solomon*, 19 Cal. 64, 79 Am. Dec. 196; *Miller v. Schneider*, 19 La. Ann. 300, 92 Am. Dec. 535. *McCreary v. Gaines*, 55 Tex. 485, 40 Am. Rep. 818; *First Nat. Bank of Macon v. Nelson*, 38 Ga. 391, 95 Am. Dec. 400.

<sup>34</sup> *Hoffman v. Noble*, 6 Metc. (Mass.) 68, 39 Am. Dec. 711. The factor, however, cannot disaffirm the pledge on the ground that he had no authority to make it. *Bott v. McCoy*, 20 Ala. 578, 56 Am. Dec. 223.

<sup>35</sup> *Kinder v. Shaw*, 2 Mass. 398; *McCreary v. Gaines*, 55 Tex. 485, 40 Am. Rep. 818.

<sup>36</sup> *Bott v. McCoy*, 20 Ala. 578, 56 Am. Dec. 223; *Kinder v. Shaw*, 2 Mass.

But a factor may deliver the possession of goods on which he has a lien, to a third person, with notice of the lien, and with a declaration that the transfer is to such person as agent of the factor, and for his benefit. This is a continuance, in effect, of the factor's possession.<sup>37</sup>

*Same—Statutory Power to Pledge*

In a number of states, however, the rules of the common law as to factors have been changed by statute.<sup>38</sup> These enactments make it possible for persons dealing with factors to take pledges of goods held by the latter, and, by so doing, acquire rights superior to those of the owner, who, by placing the property in the factor's hands, clothes him with apparent ownership. If the pledgee takes the goods knowing that the pledgor holds them as a factor, then the pledge is subject to the rights of the owner. The statutes are designed merely for the protection of bona fide pledgees.<sup>39</sup> Nor, on the other hand, is the factor given any right to pledge his principal's goods without the latter's consent. The owner may maintain an action against the factor for the tort.<sup>40</sup> The factor's acts, as they are called, apply in most of the states only to factors to whom the goods are consigned for sale, and not to mere consignees.<sup>41</sup> The owner may, in all cases,

398; *McCreary v. Gaines*, 55 Tex. 485, 40 Am. Rep. 818; *Phillips v. Huth*, 6 Mees. & W. 572, 596; *Martini v. Coles*, 1 Maule & S. 140; *Baring v. Corrie*, 2 Barn. & Ald. 137; *McCombie v. Davies*, 6 East, 538. But see *Hutchinson v. Bours*, 6 Cal. 384; *Story*, Ag. § 437.

<sup>37</sup> *Urquhart v. McIver*, 4 Johns. (N. Y.) 103; *Laussatt v. Lippincott*, 6 Serg. & R. (Pa.) 440, 9 Am. Dec. 440; *Bowie v. Napier*, 1 McCord (S. C.) 1, 10 Am. Dec. 641; *Blair v. Childs*, 10 Heisk. (Tenn.) 199; *First Nat. Bank of Louisville v. Boyce*, 78 Ky. 42, 39 Am. Rep. 198; *Contra: Merchants' Nat. Bank of Memphis v. Trenholm*, 12 Heisk. (Tenn.) 520.

<sup>38</sup> 1 Stim. Am. St. Law, §§ 4380-4385.

See New York Factors' Act after which many others are modeled, *Personal Property Law* (Consol. Laws, c. 41) § 43. See *Freudenheim v. Gutter*, 201 N. Y. 94, 94 N. E. 640; *Schmidt v. Simpson*, 204 N. Y. 434, 97 N. E. 966, Ann. Cas. 1913C, 1288; *Cairns v. Page*, 165 Mass. 552, 43 N. E. 503.

<sup>39</sup> *St. Louis Nat. Bank v. Ross*, 9 Mo. App. 399; *Evans v. Trueman*, 1 Moody & R. 10.

<sup>40</sup> *Stollenwerck v. Thacher*, 115 Mass. 224.

<sup>41</sup> *Jennings v. Merrill*, 20 Wend. (N. Y.) 9; *Stevens v. Wilson*, 6 Hill (N. Y.) 512; *Id.*, 3 Denio (N. Y.) 472; *Cartwright v. Wilmerding*, 24 N. Y. 521; *First Nat. Bank of Toledo v. Shaw*, 61 N. Y. 283; *Kinsey v. Leggett*, 71 N. Y. 387; *Howland v. Woodruff*, 60 N. Y. 72; *Chicago Taylor Printing Press Co. v. Lowell*, 60 Cal. 454; *Nickerson v. Darrow*, 5 Allen (Mass.) 419; *Stollenwerck v. Thacher*, 115 Mass. 224; *Cole v. Northwestern Bank*, L. R. 10 C. P. 354; *Fuentes v. Montis*, L. R. 3 C. P. 368; *Id.*, L. R. 4 C. P. 93; *Johnson v. Credit Lyonnais*, 2 C. P. Div. 224; *Pickering v. Busk*, 15 East, 38; *Boyson v. Coles*, 6 Maule & S. 14; *Dyer v. Pearson*, 3 Barn. & C. 38; *Boston Supply Co. v. Rubin*, 214 Mass. 217, 101 N. E. 133; *Oakland Mfg. Co. v. F. C. Linde Co.*, 162 App. Div. 543, 147 N. Y. Supp. 1045.

And the possession of the goods or the documentary evidence thereof must

recover the goods pledged, by paying the amount which the pledgee has advanced.

### *To Delegate Authority*

The mere existence of the relation of principal and factor gives the latter no implied power to delegate the authority conferred upon him. A principal having imposed trust and confidence in the ability and integrity of the factor himself, the factor must perform his duties in person, and not turn them over to subagents.<sup>42</sup> Mere mechanical duties, requiring no exercise of discretion, need not be performed by the factor himself; and a usage of trade may justify a delegation of authority by incorporating into the contract an implied power to delegate.<sup>43</sup> So, a principal may confer the power of delegation or substitution, either expressly or impliedly,<sup>44</sup> or may, after delegation by the agent, ratify or confirm the same, in such manner as to make the subagent responsible directly to the principal; but the fact that the principal knows that a subagent or factor will be employed does not relieve the liability of the agent to the principal.<sup>45</sup>

### *To Settle Except for Payment in Full*

As already seen, a factor may sell on credit, and receive payment according to the terms of the credit, but that is the limit of his power. A factor has no power, unless authorized by his principal, to receive payment for goods sold in anything but money. He cannot take depreciated currency;<sup>46</sup> nor, as already seen, can he accept other goods in payment, for that would be an exchange or barter.<sup>47</sup> So, a factor cannot sell his principal's goods in payment of his own debts,<sup>48</sup>

have been intrusted to the factor. *Prentice Co. v. Page*, 164 Mass. 276, 41 N. E. 279; *Soltau v. Gerdau*, 119 N. Y. 380, 23 N. E. 864, 16 Am. St. Rep. 843.

<sup>42</sup> *Warner v. Martin*, 11 How. 209, 13 L. Ed. 667; *Merchants' Nat. Bank of Memphis v. Trenholm*, 12 Heisk. (Tenn.) 520; *Connor v. Parker*, 114 Mass. 331; *Locke's Appeal*, 72 Pa. 491, 13 Am. Rep. 716.

<sup>43</sup> *Harralson v. Stein*, 50 Ala. 347; *Johnson v. Cunningham*, 1 Ala. 249; *Planters' & Farmers' Nat. Bank of Baltimore v. First Nat. Bank of Wilmington, N. C.*, 75 N. C. 534. A factor cannot delegate the selling of goods intrusted to him to his clerk. *Warner v. Martin*, 11 How. 224, 13 L. Ed. 667; *Loomis v. Simpson*, 13 Iowa, 532; *Combes' Case*, 9 Coke, 75, 76a.

<sup>44</sup> *Campbell v. Reeves*, 3 Head (Tenn.) 226; *Loomis v. Simpson*, 13 Iowa, 532; *Combes' Case*, 9 Coke, 75; *McMorris v. Simpson*, 21 Wend. (N. Y.) 610. *Planters' Nat. Bank of Baltimore v. First Nat. Bank of Wilmington*, 75 N. C. 534.

<sup>45</sup> *Loomis v. Simpson*, 13 Iowa, 532.

<sup>46</sup> *Sangston v. Maitland*, 11 Gill & J. (Md.) 286; *Underwood v. Nicholls*, 17 C. B. 239. But see *Greenleaf v. Moody*, 13 Allen (Mass.) 363.

<sup>47</sup> Ante, p. 156.

<sup>48</sup> *Warner v. Martin*, 11 How. 209, 13 L. Ed. 667; *Benny v. Rhodes*, 18 Mo. 147, 59 Am. Dec. 293; *Holton v. Smith*, 7 N. H. 446.

even when there is a balance due him from the principal.<sup>49</sup> He has no power to compromise the claim of the principal.<sup>50</sup> A factor cannot bind his principal by submitting to arbitration a controversy arising out of a sale made by the factor; for instance, a claim for damages arising out of an alleged breach of an implied warranty of the quality of the thing sold.<sup>51</sup> When a factor has sold goods on credit, he has no implied power to extend the time of payment.<sup>52</sup>

## RIGHTS AND LIABILITIES OF FACTORS

5. The rights and liabilities of factors will be considered under the following heads:

- (a) Duty to exercise good faith.
- (b) Duty to keep principal posted.
- (c) Liability for negligence.
- (d) Duty to follow instructions.
- (e) Duty to keep and render accounts.
- (f) Duty in remitting.
- (g) Del credere agents.
- (h) Right to commissions.
- (i) Right to reimbursement.
- (j) Right to indemnity.
- (k) Right to a lien.
- (l) Rights against third persons.
- (m) Liability to third persons.

## SAME—DUTY TO EXERCISE GOOD FAITH

6. A factor must exercise the utmost good faith in all his dealings with his principal.

Good faith is the paramount and vital principle of the law governing the relation of principal and factor. Good faith must be exercised by the factor in all his dealings with the principal's goods. The factor is not permitted to make any profit out of his agency beyond his legitimate commissions.<sup>53</sup> He cannot purchase for himself the goods

<sup>49</sup> *Benny v. Pegram*, 18 Mo. 191, 59 Am. Dec. 298.

<sup>50</sup> *Russ. Merc. Ag.* 48. But see *West Boylston Mfg. Co. v. Searle*, 15 Pick. (Mass.) 225.

<sup>51</sup> *Carnochan v. Gould*, 1 Bailey (S. C.) 179, 19 Am. Dec. 668.

<sup>52</sup> *Douglass v. Bernard*, Auth. N. P. 278.

<sup>53</sup> *Keighler v. Savage Mfg. Co.*, 12 Md. 383, 71 Am. Dec. 600; *Evans v. Potter*, 2 Gall. 12, Fed. Cas. No. 4,569; *Babcock v. Orbison*, 25 Ind. 75; *Shaw v. Stone*, 1 Cush. (Mass.) 228; *Clarke v. Tipping*, 9 Beav. 284. The making of



consigned to him for sale, except with the knowledge and consent of his principal upon a full disclosure of the circumstances surrounding the transaction, and a total absence of all fraud and concealment.<sup>54</sup> If he should purchase without such consent, the principal, on learning of the fraud, may, nevertheless, ratify the sale, and recover the purchase price.<sup>55</sup>

### SAME—DUTY TO KEEP PRINCIPAL POSTED

#### 7. A factor must keep his principal posted on all matters material to the agency.

It is a part of a factor's duty to his principal to keep him posted on all things concerning the agency of which the principal should be informed. If he fails to do so, it is negligence, and a palpable violation of duty, for which the factor is liable to respond in damages to the principal.<sup>56</sup> If a factor sells on credit, and the purchaser becomes insolvent, the factor becomes liable for the debt by failing to notify the principal within a reasonable time that the debt is bad. The principal need not prove that he has sustained any damage by reason of the factor's neglect.<sup>57</sup> So, a factor, after a loss of the principal's goods, has been held liable for failure to give early notice of the insolvency of the underwriters, with whom he has effected insurance on behalf of the principal, in order that the latter might enforce his claim, and take such steps as he might think proper for his own security.<sup>58</sup> If the goods consigned to the factor are taken out of his possession by virtue of some legal process, he should at once inform the principal.<sup>59</sup>

advances by the factor does not change the rule. *Rice v. Brook* (C. C.) 20 Fed. 611; *Britton v. Ferrin*, 171 N. Y. 235, 63 N. E. 954.

<sup>54</sup> *Keighler v. Savage Mfg. Co.*, 12 Md. 383, 71 Am. Dec. 600. So, he cannot act as agent for the purchaser. *Bensley v. Moon*, 7 Ill. App. 415; *Talcott v. Chew* (C. C.) 27 Fed. 273.

<sup>55</sup> *Wadsworth v. Gay*, 118 Mass. 44. A factor cannot make a valid sale to a partnership of which he is a member. *Martin v. Moulton*, 8 N. H. 504.

<sup>56</sup> *Harvey v. Turner*, 4 Rawle (Pa.) 223; *Arrott v. Brown*, 6 Whart. (Pa.) 9; *Howe v. Sutherland*, 39 Iowa, 484; *Western Union Cold Storage Co. v. Wisona Produce Co.*, 197 Ill. 457, 64 N. E. 496; *Dowler v. Swift & Co.*, 113 App. Div. 260, 98 N. Y. Supp. 983; *Mobile Fruit & Trading Co. v. Potter*, 78 Minn. 487, 81 N. W. 392.

<sup>57</sup> *Harvey v. Turner*, 4 Rawle (Pa.) 223; *Arrott v. Brown*, 6 Whart. (Pa.) 9. The factor by acquiescence in the expectation of the principal assumes the debt.

<sup>58</sup> *Jameson v. Swainston*, 2 Camp. 546, note. If it is the factor's duty to insure (see ante, p. 156), and for any reason he is unable to do so, he should notify the principal. *Callander v. Oelrichs*, 5 Bing. N. C. 58; *Smith v. Lasceles*, 2 Term R. 187; *Smith v. Cologan*, Id. 188, note.

<sup>59</sup> *Moore v. Thompson*, 9 Phila. 164.

## SAME—LIABILITY FOR NEGLIGENCE

### 8. A factor is liable for all losses caused by his negligence in conducting his principal's business.

A factor must exercise a sound and honest judgment in those matters which are left to his discretion. He will not be responsible if he appear to have acted to the best of his abilities, and not to have been guilty of breach of orders, negligence, or fraud.<sup>60</sup> It is not sufficient, however, that he has not been guilty of fraud, or such gross negligence as would carry with it the badges of fraud. He is required to act with reasonable care and prudence in his employment, and exercise his judgment after proper inquiry and precautions.<sup>61</sup>

If, through carelessness or want of proper examination and inquiry, he gives credit to a man who is insolvent, should a loss happen he must indemnify the principal; and, if a debt be lost by the inattention of the factor in omitting to collect it when it is in his power so to do, he will be liable for it.<sup>62</sup> Where a factor makes a sale "on 'change" for his principal, he will be held to a very high degree of vigilance in learning the pecuniary ability of the purchaser. To protect himself in case of a loss growing out of the insolvency or failure of the purchaser to pay for the goods sold, he must resort to all available sources of information that are accessible, and inattention or carelessness in this respect will render him liable for any loss sustained thereby; but he will not be held as a guarantor of such a sale.<sup>63</sup>

A factor is bound to the use of all reasonable diligence in caring for the property of his principal, and protecting it from loss. If the principal gives instructions as to the place of storing his goods until sale, these instructions must be followed by the factor, or he

<sup>60</sup> *Phillips v. Moir*, 69 Ill. 155; *Liotard v. Graves*, 3 Caines (N. Y.) 238; *Van Alen v. Vanderpool*, 6 Johns. (N. Y.) 72, 5 Am. Dec. 192; *Moore v. Mourgue*, Cowp. 480. The appointment of agents of known ability to make a collection is prima facie evidence of due diligence, and the consignor must prove negligence to hold the factor liable. *McConnico v. Curzen*, 2 Call (Va.) 358, 1 Am. Dec. 540; *Koshland v. Weber*, 23 Wyo. 241, 148 Pac. 369, 152 Pac. 167.

<sup>61</sup> *Leverick v. Meigs*, 1 Cow. (N. Y.) 645; *Millbank v. Dennistoun*, 21 N. Y. 386; *Deshler v. Beers*, 32 Ill. 368, 83 Am. Dec. 274; *Folsom v. Mussey*, 8 Greenl. (Me.) 400, 23 Am. Dec. 522; *Randall v. Kehlor*, 60 Me. 37, 11 Am. Rep. 169; *Gorman v. Wheeler*, 10 Gray (Mass.) 362; *Phillips v. Moir*, 69 Ill. 155; *Chandler v. Hogle*, 58 Ill. 46; *Leffler Co. v. L. L. Pearson & Son*, 17 Ga. App. 57, 86 S. E. 256; *Hutchins v. Vinkemulder*, 187 Mich. 676, 154 N. W. 80; *Ives v. Freisinger*, 70 N. J. Law, 257, 57 Atl. 401.

<sup>62</sup> *Greely v. Bartlett*, 1 Me. (1 Greenl.) 172, 10 Am. Dec. 54.

<sup>63</sup> *Foster v. Waller*, 75 Ill. 464.

will be held liable for any loss which occurs.<sup>64</sup> A factor is not, however, to be held liable for not anticipating a danger altogether out of the ordinary course of business or of natural events.<sup>65</sup> To protect his principal from loss, a factor may, in extraordinary cases, deviate from the instructions of the principal.<sup>66</sup>

### SAME—DUTY TO FOLLOW INSTRUCTIONS

#### 9. A factor is bound to follow any instructions given him by his principal, except—

**EXCEPTION**—When necessary to protect his advances, he may depart from his instructions.

If the instructions given by a principal to his factor are so ambiguous that two constructions may fairly be given to them, every principle of justice demands that the want of precision in the language of the principal should fix the loss, if any, upon him, rather than upon his correspondent.<sup>67</sup> If the order leaves the latter a discretion, the law requires of him nothing further than the exercise of a sound, honest judgment. But if the order be free from ambiguity, is positive and unqualified, it must be rigidly obeyed, if it be practicable; and no motive connected with the interest of the principal, however honestly entertained, or however wisely adopted, can excuse a breach of it.<sup>68</sup> Thus, where the principal gives orders to sell "on arrival,"

<sup>64</sup> *Vincent v. Rather*, 31 Tex. 77, 98 Am. Dec. 516. Since a factor is required to exercise only ordinary care in taking care of property consigned to him, he is not liable for damage to cotton caused by exposure on the wharf to the weather, he being unable to procure immediate warehouse room, owing to the destruction of all the warehouses in the city by fire. *Foster v. Bush*, 104 Ala. 662, 16 South. 625.

<sup>65</sup> *Johnson v. Martin*, 11 La. Ann. 27, 66 Am. Dec. 193.

<sup>66</sup> *Joslin v. Cowee*, 52 N. Y. 90.

<sup>67</sup> *Brown v. McGran*, 14 Pet. 479, 10 L. Ed. 550; *Courcier v. Ritter*, 4 Wash. C. C. 549, Fed. Cas. No. 3,282; *Mann v. Laws*, 117 Mass. 293; *Geyer v. Decker*, 1 Yeates (Pa.) 487; *Loeb, Cooney & Loeb v. Johnson-Salkeld Co.* (Sup.) 152 N. Y. Supp. 1046.

<sup>68</sup> *Bessent v. Harris*, 63 N. C. 542; *Courcier v. Ritter*, 4 Wash. C. C. 549, Fed. Cas. No. 3,282; *Parkist v. Alexander*, 1 Johns. Ch. (N. Y.) 394; *Williams v. Littlefield*, 12 Wend. (N. Y.) 362; *Shoenfeld v. Fleisher*, 73 Ill. 404; *Pulsifer v. Shepard*, 36 Ill. 513; *Maynard v. Pease*, 99 Mass. 555; *Feild v. Farrington*, 10 Wall. 141, 19 L. Ed. 923; *Rice v. Brook* (C. C.) 20 Fed. 611; *Sigerson v. Pomeroy*, 13 Mo. 620; *Housel v. Thrall*, 18 Neb. 484, 25 N. W. 612; *Hatcher v. Comer*, 73 Ga. 418. Where a factor was instructed by his principal to sell wheat on consignment at a specified price on a given day, and, if not sold on that day, to ship the same to New York, the factor must obey instructions, or he will be liable as for a conversion of the wheat. If, on the day he is required to sell,

it is no excuse for a failure to do so that the market was dull, if a sale could in fact have been made, though at a low price.<sup>69</sup> So, a disobedience due to a mistake of the factor is no excuse.<sup>70</sup> But a departure from instructions may be excused by the happening of an event not contemplated at the time the instructions were given.<sup>71</sup>

If the principal, being informed by his agent of a deviation from his orders, make no objection to the factor's conduct, the law construes his silence into a tacit recognition of the act or omission, against which he will not be permitted afterwards to complain. The reason is obvious. He shall not, by his silence, place his agent in the predicament of losing all the gain which may result from his well-intended disobedience, and yet be exposed to sustain the loss which a mistaken judgment or unforeseen circumstances may produce. But, to entitle the agent to the benefit of this principle of law it is incumbent upon him to act with the utmost good faith, by making to his employer a candid disclosure of his conduct, and of the causes which influenced it, in order that the latter may have the means of judging in respect to the course which it becomes him to adopt.<sup>72</sup>

he give a refusal until the morning of the day following, and accordingly perfects the sale on that day, he will be liable for disobeying the instructions of his principal, and may be treated as having converted the wheat to his own use. *Scott v. Rogers*, 31 N. Y. 676. Where a factor sells on credit, in disregard of his instructions, he becomes liable for the payment of the debt. *Hall v. Storrs*, 7 Wis. 253; *Bliss v. Arnold*, 8 Vt. 252, 30 Am. Dec. 467; *Leffler Co. v. L. L. Pearson & Son*, 17 Ga. App. 57, 86 S. E. 256.

<sup>69</sup> *Evans v. Root*, 7 N. Y. 186, 57 Am. Dec. 512. And see *Howland v. Davis*, 40 Mich. 545; *Weed v. Adams*, 37 Conn. 378. But where a factor neglects to sell cotton within a reasonable time after being instructed to sell, and it is destroyed by fire, the delay in selling is not the proximate cause of the loss, and he is not liable therefor. *Lehman v. Pritchett*, 84 Ala. 512, 4 South. 601. Where a factor receives a peremptory order from his principal to sell goods consigned to him, he must sell at once, or, if a sale cannot be made, inform his principal, and await instructions. *Spruill v. Davenport*, 116 N. C. 34, 20 S. E. 1022.

<sup>70</sup> *Rundle v. Moore*, 3 Johns. Cas. (N. Y.) 36.

<sup>71</sup> In *Dusar v. Perit*, 4 Bin. (Pa.) 361, a supercargo was compelled to go to Havana to repair his vessel, in consequence of an accident. He sold the vessel and part of the cargo at the limited price. The residue of the cargo was sold at less than the price fixed by his instructions, in consequence of the arrival of other like cargoes. The departure from instructions was held to be justified. Cf. *Bell v. Palmer*, 6 Cow. (N. Y.) 128.

So under extraordinary circumstances to save principal from loss. *Joslin v. Cowee*, 52 N. Y. 90; *Lippmann v. Brown*, 43 Misc. Rep. 632, 88 N. Y. Supp. 141.

<sup>72</sup> *Courcier v. Ritter*, 4 Wash. C. C. 549, Fed. Cas. No. 3,282. A sale by a factor contrary to the orders of his principal is not ratified by the receipt of the proceeds by the latter, where it was understood by both parties at the time of such receipt that the right of action against the factor was to be left

When a factor disobeys his instructions, the principal can hold him liable as for a conversion of the goods,<sup>73</sup> and recover the actual loss he has sustained through the factor's wrongful conduct. When the factor sells at some other time than that ordered by his principal, the measure of damages is the difference between the sum realized and what would have been realized had the sale been made according to instructions.<sup>74</sup> Where the factor sells at a less price than ordered, the recovery is not the difference between what is received and the price set,<sup>75</sup> but between what is received and what might have been received within a reasonable time.<sup>76</sup> If no actual loss has been sustained, only nominal damages are recoverable.<sup>77</sup>

### *Protecting His Advances*

Wherever a consignment is made to a factor for sale, the consignor has a right, generally, to control the sale thereof, according to his own pleasure, from time to time, if no advances have been made or liabilities incurred on account thereof; and the factor is bound to obey his orders. This arises from the ordinary relation of principal and agent. If, however, the factor, before receiving instructions, makes advances or incurs liabilities on account of the consignment, by which he acquires a special property therein, then the factor has a right, upon notice to the principal, to sell so much of the consignment as may be necessary to reimburse such advances or meet such liabilities, unless there is some existing agreement between himself and the consignor which controls or varies this right.<sup>78</sup> Thus, for

subsisting. *Smith v. Boyce*, Dud. (S. C.) 248. Where a factor sells cotton in direct violation of his instructions, the mere consignment in a succeeding year of another crop by the principal does not ratify the act, nor waive the latter's right to damages which he has notified the factor he would claim. *Maggoffin v. Cowan*, 11 La. Ann. 554.

<sup>73</sup> *Scott v. Rogers*, 31 N. Y. 676.

To constitute conversion, the departure from instructions by a bailee must be so great as to amount to an assumption of dominion over the subject-matter. See *Laverty v. Snethen*, 68 N. Y. 522, 23 Am. Rep. 184.

<sup>74</sup> *Evans v. Root*, 7 N. Y. 186, 57 Am. Dec. 512; *McLendon v. Wilson*, 52 Ga. 41.

<sup>75</sup> *Dalby v. Stearns*, 132 Mass. 230. Contra: *Switzer v. Connett*, 11 Mo. 88.

<sup>76</sup> *Romaine v. Van Allen*, 26 N. Y. 315; *Blot v. Boiceau*, 3 N. Y. 78, 51 Am. Dec. 345; *Maynard v. Pease*, 99 Mass. 555; *Fordyce v. Peper* (C. C.) 16 Fed. 516. For the rule of highest intermediate value, see *Hale*, Dam. 186; *Lippmann v. Brown*, 43 Misc. Rep. 632, 88 N. Y. Supp. 141.

<sup>77</sup> *Dalby v. Stearns*, 132 Mass. 230; *Blot v. Boiceau*, 3 N. Y. 78, 51 Am. Dec. 345; *George v. McNeill*, 7 La. 124, 26 Am. Dec. 498; *Johnson v. Wade*, 2 Baxt. (Tenn.) 480.

<sup>78</sup> *Hallowell v. Fawcett*, 30 Iowa, 491; *Hilton v. Vanderbilt*, 82 N. Y. 591; *Marfield v. Goodhue*, 3 N. Y. 62; *Davis v. Kobe*, 36 Minn. 214, 30 N. W. 662, 1 Am. St. Rep. 663; *Brown v. McGran*, 14 Pet. 479, 10 L. Ed. 550.

example, if, contemporaneous with the consignment and advances or liabilities, there are orders given by the consignor, which are assented to by the factor, that the goods shall not be sold until a fixed time, in such a case the consignment is presumed to be received by the factor subject to such orders; and he is not at liberty to sell the goods. to reimburse his advances or liabilities, until after that time has elapsed.<sup>79</sup> The same rule will apply to orders not to sell below a fixed price; unless, in either case, the consignor shall, after due notice and request, refuse to provide any other means to reimburse the factor.<sup>80</sup> And in no case will the factor be at liberty to sell the consignment contrary to the order of the consignor, although he has made advances or incurred liabilities thereon, if the consignor stands ready and offers to reimburse and discharge such advances and liabilities. On the other hand, where the consignment is made generally, without any specific orders as to the time or mode of sale, and the factor makes advances or incurs liabilities on the footing of such consignment, there the legal presumption is that the factor is intended to be clothed with the ordinary rights of factors to sell, in the exercise of a sound discretion, at such time and in such mode as the usage of trade and his general duty require, and to reimburse himself for his advances and liabilities, out of the proceeds of the sale; and the consignor has no right, by any subsequent orders, given after advances have been made or liabilities incurred by the factor, to suspend or control this right of sale, except so far as respects the surplus of the consignment not necessary for the reimbursement of such advances or liabilities.<sup>81</sup> The factor must not sell more than is necessary to reim-

<sup>79</sup> *Brown v. McGran*, 14 Pet. 479, 10 L. Ed. 550; *Fordyce v. Peper* (C. C.) 16 Fed. 516; *De Comas v. Prost*, 3 Moore, P. C. (N. S.) 158; *Smart v. Sandars*, 5 Man., G. & S. 895.

<sup>80</sup> *Parker v. Brancker*, 22 Pick. (Mass.) 40; *Marfield v. Goodhue*, 3 N. Y. 62; *Hilton v. Vanderbilt*, 82 N. Y. 591; *Mooney v. Musser*, 45 Ind. 115; *Davis v. Kobe*, 36 Minn. 214, 30 N. W. 662, 1 Am. St. Rep. 663. When a demand would be useless or impracticable, as where the principal is insolvent or in a distant country, no demand is necessary. *Brown v. McGran*, 14 Pet. 479, 10 L. Ed. 550.

In *Ex parte Dalgety*, 10 New South Wales St. Rep. 175, the doctrine of these cases is said to be contrary to the English law as established in *Smart v. Sanders*, 5 C. B. 855, and *De Comas v. Prost*, 8 Moore, P. C. (N.S.) 158; and it is declared that in no case may the agent violate instructions, unless his advances were made upon such an express understanding.

And see *Zimmermann v. Heil*, 86 Hun, 114, 33 N. Y. Supp. 391, affirmed 156 N. Y. 703, 51 N. E. 1094, which holds that agent may not hold for a rise against instructions. *S. P. Butterfield v. Stephens*, 59 Iowa, 596, 13 N. W. 751. *Contra: Weed v. Adams*, 37 Conn. 378.

<sup>81</sup> *Feild v. Farrington*, 10 Wall. 141, 19 L. Ed. 923; *Talcott v. Chew* (C. C.) 27 Fed. 273; *Rice v. Brook* (C. C.) 20 Fed. 611; *Blackmar v. Thomas*, 28 N. Y.

burse himself.<sup>82</sup> Of course, this right of the factor to sell, to reimburse himself for his advances and liabilities, applies with stronger force to cases where the consignor is insolvent, and where, therefore, the consignment constitutes the only fund for indemnity.<sup>83</sup>

### SAME—DUTY TO ACCOUNT

#### 10. It is a factor's duty to keep accurate accounts of his dealings on behalf of his principal, and to render statements of account when required.

A factor, like other agents, is in duty bound, whenever reasonably requested so to do, to make and present to his principal a full and complete statement of the dealings and state of the accounts between the parties, to the end that the principal may know the state of his affairs, and ascertain the obligations he may be under to his agent. The information sought by a demand of a statement is presumed to be solely with the agent and that the principal is ignorant of the true state of affairs as connected with the business confided to the agent.<sup>84</sup> In order that he may fulfill his obligation to account, it is the duty of a factor to keep books, in which shall be correctly entered the transactions on account of his principal, and the latter is entitled to a correct copy of the entries, including all memoranda connected

67; *Butterfield v. Stephens*, 59 Iowa, 596, 13 N. W. 751; *Howard v. Smith*, 56 Mo. 314; *Davis v. Kobe*, 36 Minn. 214, 30 N. W. 662, 1 Am. St. Rep. 663.

<sup>82</sup> *Nelson v. Chicago, B. & Q. R. Co.*, 2 Ill. App. 180; *Weed v. Adams*, 37 Conn. 378; *Howard v. Smith*, 56 Mo. 314.

<sup>83</sup> *Brown v. McGran*, 14 Pet. 479, 10 L. Ed. 550. Where goods are consigned to a factor, without instructions, and without advances made or liabilities incurred by the factor, the principal may at any time control and direct him as to the terms, time, and manner of selling. *Marfield v. Douglass*, 3 N. Y. Super. Ct. 360. A factor who does not accept the terms on which a consignment to him is made cannot resist such other disposal of the goods as the consignor may make. *Winter v. Coit*, 7 N. Y. 288, 57 Am. Dec. 522.

<sup>84</sup> *Terwilliger v. Beals*, 6 Lans. (N. Y.) 403; *Keighler v. Savage Mfg. Co.*, 12 Md. 383, 71 Am. Dec. 600; *Dodge v. Perkins*, 9 Pick. (Mass.) 368; *Clark v. Moody*, 17 Mass. 145. A principal is entitled to a full knowledge of the collateral securities in the hands of his factor, of what has been received from them, and a detailed statement of their condition. *Keighler v. Savage Mfg. Co.*, *supra*. The factor cannot refuse to account on the ground that the dealings between the principal and the purchasers were illegal. *Baldwin v. Potter*, 46 Vt. 402. Where a principal applied to his factor, to whom he had intrusted goods for sale under an agency of indefinite duration, for return of the goods, and notified him of a termination of the agency, and the factor, claiming a lien for advances and commissions, declined to surrender, and, upon the principal's offer to pay the amount of the claims, substantially refused

therewith.<sup>85</sup> But where a factor has rendered his account of sales regularly, and the same were settled with full knowledge of all their items, and the names of purchasers were not then required, it is unreasonable, at any considerable distance of time thereafter, to subject the factor to a demand for such names, if his conduct has been honest and faithful, and free from fraud or deceit.<sup>86</sup> A factor is not bound to account to his principal until the time fixed by the terms of his employment or a demand made by the principal.<sup>87</sup> When a factor receives money, for his principal, he becomes the principal's debtor in that amount, and is not required to keep the funds of the principal separate from his own. If he is acting for several principals, he may mingle all the funds in a common mass.<sup>88</sup> In this respect, factors differ from other agents.<sup>89</sup>

The payment of a balance of account by a factor or commission merchant to his principal, after the sales made, and for the purpose of closing the accounts between the parties, is an assumption of the outstanding debts; and consequently the principal is no longer account-

to make a statement of them, it was held that the lien was forfeited, and the principal could maintain replevin for the goods. *Terwilliger v. Beals*, 6 *Lans.* (N. Y.) 403. Where a factor has transmitted to his principal accounts of two different sales of the same goods, the principal, after having approved and recognized the first account, is not bound to notice or object to the second, at the peril of its being taken as a stated account, and held binding upon him. *Cartwright v. Greene*, 47 *Barb.* (N. Y.) 9. The owner of goods has a right to waive a tort, as against factors, and to bring an action to compel them to account. *Lubert v. Chauviteau*, 3 *Cal.* 458, 58 *Am. Dec.* 415. Since he waives the tort, and sues the defendants as factors, he can recover only the net proceeds, deducting charges, etc., and not the absolute value of the goods. *Lubert v. Chauviteau*, 3 *Cal.* 458, 58 *Am. Dec.* 415. A pledgee is a proper party to call a factor to account, where he receives the goods with the understanding that he should dispose of them through a factor, and credit the debtor with the amount of sales, and he accordingly commits them to a factor, from whom he takes a receipt. *Bigelow v. Walker*, 24 *Vt.* 149, 58 *Am. Dec.* 156. A factor may file a bill against his principal for an account. *Ludlow v. Simond*, 2 *Caines, Cas.* (N. Y.) 1, 2 *Am. Dec.* 291.

<sup>85</sup> *Keighler v. Savage Mfg. Co.*, 12 *Md.* 383, 71 *Am. Dec.* 600.

<sup>86</sup> *Id.*

<sup>87</sup> *Leake v. Sutherland*, 25 *Ark.* 219; *Cooley v. Betts*, 24 *Wend.* (N. Y.) 203. It is the duty of factors who receive goods to sell to account for the proceeds in a reasonable time, without previous demand, where a demand is impracticable or highly inconvenient. *Eaton v. Welton*, 32 *N. H.* 352; *Lyle v. Murray*, 6 *N. Y. Super. Ct.* 590.

Probably the true rule is that he must account within a reasonable time, or at all events upon a reasonable demand. *Mechem, Ag.* (2d Ed.) § 2544; *Langley v. Sturtevant*, 7 *Pick.* (Mass.) 214.

<sup>88</sup> *Vail v. Durant*, 7 *Allen* (Mass.) 408, 83 *Am. Dec.* 695.

<sup>89</sup> *Mechem, Ag.* (2d Ed.) § 2543; *Rice v. Winslow*, 180 *Mass.* 500, 62 *N. E.* 1057.



able or bound to refund advances, though the debtors finally fail to pay for goods sold on credit, the proceeds of which were looked to for reimbursement.<sup>90</sup> But a note given for the balance of an account, though *prima facie* evidence of payment of the account, may be explained and rebutted by proof as to the nature of the transaction between the original parties.<sup>91</sup>

### SAME—DUTY IN REMITTING

**11. A factor is not bound to remit until ordered to do so. If he remits without orders, the remittance is at his own risk.**

A factor is under no obligation to remit to his principal any balance due the latter until he is instructed to do so.<sup>92</sup> A usage or course of dealing between the parties, by which the factor was to remit without instructions, would, of course, alter the case.<sup>93</sup> Until there has been a demand by the principal, he cannot maintain an action against the factor for any balance due, since the factor is guilty of no breach of duty in retaining the funds.<sup>94</sup> If the factor undertakes to remit when no direction or authority has been given, the remittance is at his

<sup>90</sup> *Oakley v. Crenshaw*, 4 Cow. (N. Y.) 250. But, to throw this upon the factor, a clear intention to assume it should in all cases be shown. *Robertson v. Livingston*, 5 Cow. (N. Y.) 473. Accepting the final account of a factor, without objection, discharges him from all further liability to account for sales made by him on a credit, the proceeds of which he has not collected. *Rion v. Gilly*, 6 Mart. O. S. (La.) 417, 12 Am. Dec. 483.

<sup>91</sup> *Hapgood v. Batcheller*, 4 Metc. (Mass.) 573. Where a commission merchant sold goods on a credit, and then settled with his principal, giving him a note for the balance, which he stated was to accommodate him, and, for that reason, he made it payable a few days after the note of the vendee fell due, held, that this was not an assumption of the vendee's debt, but that, to throw this upon the commission merchant, a clear intention to assume it should have been shown. *Robertson v. Livingston*, 5 Cow. (N. Y.) 473. In absence of any contract, or usage which may be evidence of contract, a factor is not liable for interest until he is in some default. *Ellery v. Cunningham*, 1 Metc. (Mass.) 112. A *del credere* factor who, by the default of purchasers, has become liable to pay the price to his principal, is chargeable with interest, without demand. *Blakely v. Jacobson*, 22 N. Y. Super. Ct. 140.

<sup>92</sup> *Halden v. Crafts*, 4 E. D. Smith (N. Y.) 490; *Ferris v. Paris*, 10 Johns. (N. Y.) 285; *Cooley v. Betts*, 24 Wend. (N. Y.) 203.

See *Mechem*, Ag. (2d Ed.) § 1339, where it is said this rule presupposes that the agent has notified the principal of receipt of money. If no notice given, agent is liable without demand. *Bedell v. Janney*, 9 Ill. (4 Gilman) 193.

<sup>93</sup> *Brink v. Dolsen*, 8 Barb. (N. Y.) 337.

<sup>94</sup> *Halden v. Crafts*, 4 E. D. Smith (N. Y.) 490; *Brink v. Dolsen*, 8 Barb. (N. Y.) 337; *Cooley v. Betts*, 24 Wend. (N. Y.) 203; *Clark v. Moody*, 17 Mass. 145.

own risk.<sup>95</sup> If a factor remit in some other manner than that ordered by his principal, or justified by the course of dealing between them, he assumes the risk himself, and must bear any loss that occurs.<sup>96</sup>

But where a factor is directed to remit in bills, if he procure such as are drawn by persons of undoubted credit at the time, it is a compliance with the duty he has to perform. The person on whom the bill is drawn rests in the discretion of the drawer. The law presumes he has effects of the drawer in his hands. If the factor has no cause to doubt the fact, he may take the bill consistently with the duty he owes his principal, and will not be liable on the ground of negligence, although it should afterwards turn out that the drawee was not of known responsibility. In such a case it is not required of the factor first to ascertain whether the person on whom the bill is drawn is in good credit. Where the principal and factor reside at a distance from each other, it cannot be reasonably expected that the latter will have it in his power to obtain information, so as to decide with safety. But where the factor procures bills drawn by a firm or one of the partners, and the drawee proves insolvent, the factor is liable if he was in any way negligent in investigating the credit of the partners.<sup>97</sup>

### SAME—DEL CREDERE AGENTS

12. A *del credere* agent contracts to become absolutely liable for the price of goods sold by him if they are not paid for by the purchaser at the expiration of the term of credit. Such a contract is not within the statute of frauds.

A certain amount of confusion in terms is to be found in the books as to the exact nature of the undertaking of a factor who acts under a *del credere* contract. Such a contract is in form a guaranty or warranty of the purchaser's solvency. On the one hand, there are those who maintain that an agent *del credere* for the sale of goods makes himself absolutely and in the first instance liable to his principal for the price of the goods sold;<sup>98</sup> while, on the other hand, it has

<sup>95</sup> *Halden v. Crafts*, 4 E. D. Smith (N. Y.) 490; *Clark v. Moody*, 17 Mass. 145.

Is not the factor's undertaking, in the absence of special circumstances, to remit in the usual way? See *Cartwright v. Greene*, 47 Barb. (N. Y.) 9.

<sup>96</sup> *Kerr v. Cotton*, 23 Tex. 411; *Foster v. Preston*, 8 Cow. (N. Y.) 198.

<sup>97</sup> *Leverick v. Meigs*, 1 Cow. (N. Y.) 645; *Chandler v. Hogle*, 58 Ill. 46; *Goldsmith v. Manheim*, 109 Mass. 187.

<sup>98</sup> *Wienholt v. Roberts*, 2 Camp. 586; *Houghton v. Matthews*, 3 Bos. & P. 485; *Grove v. Dubois*, 1 Term R. 112; *Mackenzie v. Scott*, 6 Brown, P. C. 280.

been strongly maintained that such an agent only incurs a secondary responsibility, that of mere surety, whereby he can be required to pay only in the event of failure on the part of the principal debtor.<sup>99</sup> And some of the authorities have gone to the extreme of maintaining that the undertaking of the agent under a del credere commission is a mere guaranty of the debt of another, and therefore within the statute of frauds.<sup>1</sup> The truth of the matter seems to be that the del credere contract is *sui generis*. The factor does in a certain measure become the principal debtor, but yet an agency relation continues which materially affects that of debtor and creditor. There is little, if any, conflict in the decisions themselves apart from the dicta found in the opinions.

All the cases concede it to be the right of the principal to forbid payment to the agent, and to maintain an action himself against the buyer to recover the price of the goods, or to pursue his goods or the notes taken for them into the hands of third parties, precisely as if no del credere contract existed.<sup>2</sup> And, though such right in the principal would seem to be consistent only with a collateral undertaking by the agent, yet the contract del credere, being *sui generis*, is held in no wise to change the original and independent character of the agent's undertaking to his principal.<sup>3</sup> A factor, under a del credere commission, becomes liable to his principal when the purchase money is due. As between him and his principal, he then becomes bound to pay, not conditionally, but absolutely, in the first instance. Hence, after the factor has sold the goods on credit, and sent an account of sales to his principal, the latter may recover the price of the goods of the factor, without showing that he has endeavored to collect the money of the persons to whom the factor sold the goods.<sup>4</sup> "The undertaking of a factor is merely to answer for the solvency of the buyers of the goods, or rather to guarantee to the principal the payment of the debts due from the buyers. He becomes liable to pay to

<sup>99</sup> *Morris v. Cleasby*, 4 Maule & S. 566; *Thompson v. Perkins*, 3 Mason, 232, Fed. Cas. No. 13,972.

<sup>1</sup> See *Lewis v. Brehme*, 33 Md. 412, 3 Am. Rep. 190.

<sup>2</sup> *Thompson v. Perkins*, 3 Mason, 232, Fed. Cas. No. 13,972.

<sup>3</sup> *Lewis v. Brehme*, 33 Md. 412, 3 Am. Rep. 190.

<sup>4</sup> *Cartwright v. Greene*, 47 Barb. (N. Y.) 9. A factor who guarantees sales made by him on commission is entitled to credit for goods which he had sold, and charged to himself in his account of sales, but afterwards received back from the buyers, pursuant to authority given by his principal to settle a dispute as to the quality, and for goods recovered from the buyers for fraud in procuring the sale. *Talcott v. Canton Mills Co.* (Ct. Arb.) 30 N. Y. Supp. 421. A factor may, by contract, guarantee the collection of the price of goods to be sold, and also that their sale shall realize certain sums. *First Nat. Bank of Elgin v. Schween*, 127 Ill. 573, 20 N. E. 681, 11 Am. St. Rep. 174.

the principal the amount of the purchase money, if the buyers fail to pay it, when it becomes due; and his undertaking is not collateral within the statute of frauds, but is an original and absolute agreement, that the prices for which the goods are sold, or the debts created by the sales of the goods, shall be paid to the principal when the credit given on the sales shall have expired.”<sup>5</sup>

### SAME—RIGHT TO COMMISSIONS

#### 13. A factor is entitled to a commission on the sales made by him, unless some other compensation has been agreed upon.

A factor usually receives his compensation in a commission on the amount of sales made. The rate is fixed by the contract of the parties, by the usage of trade, or upon a quantum meruit.<sup>6</sup> The relation of principal and factor may exist though the factor receives his compensation in the form of a salary.<sup>7</sup> A *del credere* agent usually receives an additional commission for guarantying the solvency of the purchasers.<sup>8</sup> Ordinarily, a factor who takes commissions from his principal, who employs him to sell, would violate his contract should he also take commissions from the person to whom he sells;<sup>9</sup> but,

<sup>5</sup> *Bradley v. Richardson*, 23 Vt. 720, Fed. Cas. No. 1,786; *Cushman v. Snow*, 186 Mass. 169, 71 N. E. 529; *Commercial Credit Co. v. Girard Nat. Bank*, 246 Pa. 88, 92 Atl. 44.

<sup>6</sup> *Story*, Ag. § 326. Whether a factor is entitled to commission on a sale on credit where the purchaser fails depends on usage. *Clark v. Moody*, 17 Mass. 145. Factors in gold dust have no right to take their pay or compensation out of the gold dust. The gold dust is to be treated as property, and their compensation must be estimated in money. *McCune v. Erfort*, 43 Mo. 134. The suggestion in 1 Pars. Cont. \*99, that a factor may be entitled to commissions when he is prevented without his fault, by some irresistible obstacle, from completing a sale, does not seem to be supported by the authorities cited. A factor cannot be deprived of his commissions by the willful act of his principal. The execution of a contract of agency, whose obligations are mutual, cannot be placed entirely at the principal's option. *Thompson v. Packwood*, 2 La. Ann. 624; *Duncan v. Jacob Doll & Sons*, 75 W. Va. 381, 84 S. E. 792; *Newburger-Morris Co. v. Talcott*, 172 App. Div. 485, 158 N. Y. Supp. 785.

<sup>7</sup> *State v. Thompson*, 120 Mo. 12, 25 S. W. 346; *Winne v. Hammond*, 37 Ill. 99; *Coutourie v. Roensch* (Tex. Civ. App.) 134 S. W. 413.

<sup>8</sup> *Lewis v. Brehme*, 33 Md. 412, 3 Am. Rep. 190. A *del credere* commission is not demandable when the sale is made on credit, but is, nevertheless, paid for in cash, in consideration of a deduction of a certain percentage. *Kingston v. Wilson*, 4 Wash. C. C. 310, Fed. Cas. No. 7,823; *In re Heckathorn* (D. C.) 144 Fed. 499.

<sup>9</sup> *Talcott v. Chew* (C. C.) 27 Fed. 273; *Raisin v. Clark*, 41 Md. 158, 20 Am. Rep. 66; *Lynch v. Fallon*, 11 R. I. 311, 23 Am. Rep. 458; *Scribner v. Collar*, 40 Mich. 375, 29 Am. Rep. 541.

when it is clearly understood by all the parties that one who is paid commissions to sell is also to charge commissions from the buyer, the transaction is not illegal.<sup>10</sup>

A factor who is guilty of fraud or gross negligence in the conduct of his principal's business forfeits all claim to commissions or other compensation for his services.<sup>11</sup>

### SAME—RIGHT TO REIMBURSEMENT

#### 14. A factor is entitled to be reimbursed for advances made to the principal, and for expenses properly incurred in conducting the business.

A principal is bound to reimburse his factor for all advances made on goods consigned to the latter, and for all sums properly expended on the principal's account.<sup>12</sup> Where a factor makes advances, independent of an actual agreement to that effect, the legal inference is that they were made upon the joint credit of the personal security of the principal, and of his goods and money that might come to hand. This being the case, the factor may relinquish his lien on the latter without at all affecting his personal remedy. So he may renounce his right to resort to the person, and look alone to his lien for reimbursement.<sup>13</sup> It has been held that the factor should resort first to the

<sup>10</sup> Talcott v. Chew (C. C.) 27 Fed. 273.

<sup>11</sup> Fordyce v. Peper (C. C.) 16 Fed. 516; Norman v. Peper (C. C.) 24 Fed. 403; Talcott v. Chew (C. C.) 27 Fed. 273; Dodge v. Tileston, 12 Pick. (Mass.) 328; Brannan v. Strauss, 75 Ill. 234; Segar v. Parrish, 20 Grat. (Va.) 672; Vennum v. Gregory, 21 Iowa, 326; Smith v. Crews, 2 Mo. App. 269; White v. Chapman, 1 Starkie, 113; Hamond v. Holiday, 1 Car. & P. 384; Denew v. Daverell, 3 Camp. 451; Hurst v. Holding, 3 Taunt. 32. But not for an honest mistake. Everingham v. Halsey, 108 Iowa, 709, 78 N. W. 220.

<sup>12</sup> Dolan v. Thompson, 126 Mass. 183; Beckwith v. Sibley, 11 Pick. (Mass.) 482; Upham v. Lefavour, 11 Metc. (Mass.) 174; Corlies v. Cumming, 6 Cow. (N. Y.) 181; Strong v. Stewart, 9 Heisk. (Tenn.) 137; Birge-Forbes Co. v. Heye, 212 Fed. 112, 128 C. C. A. 628; Newburger-Morris Co. v. Talcott, 172 App. Div. 485, 158 N. Y. Supp. 785; Overstreet v. Hancock (Tex. Civ. App.) 177 S. W. 217.

<sup>13</sup> Burrell v. Phillips, 1 Gall. 360, Fed. Cas. No. 2,200; Peisch v. Dickson, 1 Mason, 9, Fed. Cas. No. 10,911; Corlies v. Cumming, 6 Cow. (N. Y.) 181; Balderston v. National Rubber Co., 18 R. I. 338, 27 Atl. 507, 49 Am. St. Rep. 772. The owner of goods, on consigning them to a commission merchant for sale, drew bills upon the consignee, which were accepted and paid, and the consignee, on selling the goods, took notes of the purchasers, payable to himself or order, but, before the notes fell due, the purchasers became insolvent. It was held that prima facie a right of action accrued to the consignee immediately upon his making the advances

goods for reimbursement unless that course is shown to be impracticable.<sup>14</sup>

### SAME—RIGHT TO INDEMNITY

**15. A factor is entitled to indemnity for all losses and liabilities growing out of the principal's business.**

A principal is bound to indemnify his factor for all losses sustained or liabilities incurred in the course of the agency.<sup>15</sup> If the factor sells goods in his own name, with the usual warranties, and is compelled to pay the purchaser damages for breach of warranty, he is entitled to indemnity from the principal.<sup>16</sup> And where cotton was consigned to a factor, to be sold on commission, and if, after it was sold, and the account between him and the principal settled, he was compelled to refund to the purchaser on account of the false packing of some of the cotton, he can recover therefor from the principal; but reclamation must be made according to the custom of the business, within such reasonable time as would enable the defendants to reclaim from the parties from whom they purchased. What would be a reasonable time would be for the jury to decide.<sup>17</sup>

to the consignor, notwithstanding he had a lien on the notes as security for the debt due to him, and that the burden of proof was on the consignor to show an agreement not to commence an action until the notes should have fallen due, and been dishonored. *Beckwith v. Sibley*, 11 Pick. (Mass.) 482. The factor may sue without waiting for a sale to be made. *Dolan v. Thompson*, 126 Mass. 183. There may, of course, be an agreement to wait for a sale. *Upham v. Lefavour*, 11 Metc. (Mass.) 174.

<sup>14</sup> *Corlies v. Cumming*, 6 Cow. (N. Y.) 181; *Gihon v. Stanton*, 9 N. Y. 476; *Frothingham v. Everton*, 12 N. H. 239; *In re Murphy Co.'s Estate*, 214 Pa. 258, 63 Atl. 745, 5 L. R. A. (N. S.) 1147, 6 Ann. Cas. 308. *Contra*: *Dolan v. Thompson*, 126 Mass. 183.

<sup>15</sup> *Ramsay v. Gardner*, 11 Johns. (N. Y.) 439; *Stocking v. Sage*, 1 Conn. 519.

But not when expenditure is improper. *Mills Novelty Co. v. Dupouy*, 203 Fed. 254, 121 C. C. A. 452, 45 L. R. A. (N. S.) 788; *Harvey v. Merrill*, 150 Mass. 1, 22 N. E. 49, 5 L. R. A. 200, 15 Am. St. Rep. 159; *Monnet v. Mertz*, 127 N. Y. 151, 27 N. E. 827.

<sup>16</sup> *Holdgate v. Clark*, 10 Wend. (N. Y.) 216; *Hill v. Packard*, 5 Wend. (N. Y.) 375. So, where the factor mistakenly sold repudiated bonds, under a representation that they were good "fundable bonds," the principal was compelled to make the loss good to the factor. *Maitland v. Martin*, 86 Pa. 120. Where a commission merchant, by direction of his principal, sold for the latter 5,000 bushels of wheat, to be delivered at any time during the current year, at the seller's option, and after an advance in the price the principal refused to stand to the contract, and the factor settled with the buyer by paying him the difference between the contract price and the market value, the principal being unknown to the purchaser; held, that the principal was liable to his agent for the sum so paid by him, and also for his commissions. *Searing v. Butler*, 69 Ill. 575.

<sup>17</sup> *Beach v. Branch*, 57 Ga. 362.

## SAME—LIEN

16. A factor has a general lien on all the property of his principal in his hands, to secure his demands against the principal. The lien is subject to the following conditions:
- (a) It does not attach to the goods of the principal until they come into the factor's possession.
  - (b) It is extinguished by payment or waiver.
  - (c) It may be foreclosed or enforced by a sale of the property by the factor.

A factor has a lien, not only for his commissions, but for his expenses in conducting the business, for advances made to the principal, and for liabilities incurred by the factor for the principal.<sup>18</sup> No distinction is recognized between a lien for special advances or general advances on account of business. Nor do the books seem to limit the

<sup>18</sup> *Eaton v. Truesdail*, 52 Ill. 307; *Matthews v. Menedger*, 2 McLean, 145, Fed. Cas. No. 9,289; *Vail v. Durant*, 7 Allen (Mass.) 408, 83 Am. Dec. 695; *Haebler v. Luttgen*, 61 Minn. 315, 63 N. W. 720; *Colley v. Merrill*, 6 Greenl. (Me.) 51; *State ex rel. Parker v. Thompson*, 120 Mo. 12, 25 S. W. 346; *Hodgson v. Payson*, 3 Har. & J. (Md.) 339, 5 Am. Dec. 439; *Nesmith v. Dyeing, Bleaching & Calendering Co.*, 1 Curt. C. C. 130, Fed. Cas. No. 10,124; *Jordan v. James*, 5 Ohio, 88. The lien does not cover debts having no connection with the agency. *Stevens v. Robins*, 12 Mass. 182; *Houghton v. Matthews*, 3 Bos. & P. 485; *Drinkwater v. Goodwin*, Cowp. 251. And see *Barry v. Boninger*, 46 Md. 59. A factor's lien does not exist when the general balance of account is against the factor. *McGraft v. Rugee*, 60 Wis. 406, 19 N. W. 530, 50 Am. Rep. 378. A factor has no lien in respect of debts which arose prior to the time at which his character of factor commenced, nor in respect to torts. *Sturgis v. Slacum*, 18 Pick. (Mass.) 36. A factor, accepting a consignment with instructions as to payment of the proceeds, has no lien for any general balance due him. *Goodhue v. McClarty*, 3 La. Ann. 447. Where a factor indorses bills for his principal, such liability gives him, as a factor, a lien on a bill then in his hands belonging to the principal, and indorsed to him for collection, to meet the event of his indorsements; and the fact that the factor receives a commission on his indorsements does not in any way affect the general question as to his lien as factor. *Hodgson v. Payson*, 3 Har. & J. (Md.) 339, 5 Am. Dec. 439. A factor's lien for a general balance accrued in the lifetime of his principal does not attach to the property coming into the factor's possession after the principal's death, by order of his representative. See *Wylly v. King*, Ga. Dec. (pt. 2) p. 7. Statutes in Georgia and Louisiana give a factor who advances money and supplies to a planter, to enable him to raise a crop, under an agreement that the crop shall be consigned to the factor, a lien on the crop while growing. *Thomason v. Poullain*, 54 Ga. 306; *Tift v. Newsom*, 44 Ga. 600; *Smith v. Williams*, 22 La. Ann. 268; *Richardson v. Dinkgrave*, 26 La. Ann. 651.

lien to property acquired with the money advanced, but it seems to extend to all of the property in his hands, against third persons.<sup>19</sup>

As between the principal and factor, the general right of property in the owner will be made to yield to the special property of the factor, necessary to satisfy his liens.<sup>20</sup> Yet the owner may, at any time before actual sale, by paying the balance and discharging the responsibilities of the factor, withdraw his effects; and, if the factor become insolvent, the goods remain the property of the principal, subject to the lien of the factor.<sup>21</sup> These liens are allowed for the convenience of trade, with a view to the nature of the factor's employment, and to encourage advances upon goods in his possession, or to be consigned to him, and are favored.<sup>22</sup> The factor's right to his lien is an agreement which the law implies.<sup>23</sup> If the factor has sold the goods, and parted with the possession, he has a lien on the price in the hands of the purchaser for what is due to him; and the owner cannot set up his right to the money, except where the factor has nothing due to him.<sup>24</sup> And, where the owner aliens the property, the purchaser takes it subject to the lien of the factor.<sup>25</sup>

A commission merchant who has sold a part of the goods left with him for sale is entitled to a lien upon the residue.<sup>26</sup> The lien of a factor covers also money recovered on an insurance policy, taken out in favor of the principal.<sup>27</sup> But a factor has no lien on goods of a stranger consigned to him by one having no right to do so.<sup>28</sup> In some states, however, it has been provided by statute that every person in whose name merchandise is shipped for sale shall be deemed the true owner so far as to entitle the consignee to a lien thereon for money

<sup>19</sup> *Winne v. Hammond*, 37 Ill. 99.

<sup>20</sup> *Hollingworth v. Tooke*, 2 H. Bl. 503. The factor has only a special property. *U. S. v. Villalonga*, 23 Wall. 35, 23 L. Ed. 64; *Williams v. Tilt*, 36 N. Y. 319; *Heard v. Brewer*, 4 Daly (N. Y.) 136; *Hall v. Hinks*, 21 Md. 406.

<sup>21</sup> *Zinck v. Walker*, 2 W. Bl. 1154, 1156.

<sup>22</sup> *Houghton v. Matthews*, 3 Bos. & P. 485, 488, 498.

<sup>23</sup> *Walker v. Birch*, 6 Term R. 262; *Coutourie v. Roensch* (Tex. Civ. App.) 134 S. W. 413.

<sup>24</sup> *Brander v. Phillips*, 16 Pet. 121, 10 L. Ed. 909; *Brown v. McGran*, 14 Pet. 479, 10 L. Ed. 550; *Brown v. Combs*, 63 N. Y. 598; *Drinkwater v. Goodwin*, Cowp. 256; *Houghton v. Matthews*, 3 Bos. & P. 489.

<sup>25</sup> *Godin v. Assurance Co.*, 1 Burrows, 489; *Jordan v. James*, 5 Ohio, 88; *Eaton v. Truesdail*, 52 Ill. 307.

<sup>26</sup> *Sewall v. Nichols*, 34 Me. 582.

<sup>27</sup> *Johnson v. Campbell*, 120 Mass. 449.

<sup>28</sup> *Bank of Rochester v. Jones*, 4 N. Y. 497, 55 Am. Dec. 290; *Thacher v. Hannahs*, 27 N. Y. Super. Ct. 407; *Oliver v. Moore*, 12 Heisk. (Tenn.) 482; *Ryberg v. Snell*, 2 Wash. C. C. 403, Fed. Cas. No. 12,190; *Bell v. Powell*, 23 La. Ann. 796; *Succession of Norton*, 24 La. Ann. 218; *Holland v. Humble*, 1 Star-  
kie, 143.



advanced or securities given to the shipper on account of the consignment, unless the consignee had notice, by the bill of lading or otherwise, that the shipper was not the actual owner.<sup>29</sup> These statutes do not apply, of course, unless the real owner consented to the shipment. The acts operate as an estoppel on him for the protection of the factor. When the consignment was made in violation of his rights, he is not estopped.<sup>30</sup>

### *When Lien Attaches*

The lien of a factor is dependent on possession, and does not attach until the property on which it is obtained is in the possession of the factor.<sup>31</sup> A great deal of difficulty has been encountered in determining what constitutes possession by the factor, and there is some conflict in the cases, though it is not so extensive as it seems at first sight. Whether the necessary possession exists is a question to be determined by the special facts of each case. The difficulty is confined almost entirely to cases where goods have been consigned to a factor to whom the consignor was indebted, and the consignor has subsequently, but before the goods were received into the actual custody of the factor, attempted to change the consignment to another person,<sup>32</sup> or the consignor's creditors have seized the goods before they reached the factor.

Where there is a general balance of account due the factor, a consignment of goods, without any special contract that those goods shall be so consigned, does not give the factor a lien at the time they are received by the carrier.<sup>33</sup> And especially is this the case when the

<sup>29</sup> Massachusetts, Pub. St. c. 71, § 2; Maine, Rev. St. c. 31, § 1; Rhode Island, Pub. St. c. 136, § 1; New York, Laws 1830, c. 179, § 1; Ohio, Rev. St. § 3214; Wisconsin, Sanb. & B. Ann. St. § 3345; Maryland, Rev. Code, art. 34, §§ 1, 2; Pennsylvania, Brightly's Purd. Dig. "Factors," §§ 1, 2. The New York statute is now section 182 of the Lien Law (Consol. Laws, c. 33).

<sup>30</sup> Kinsey v. Leggett, 71 N. Y. 387; Howland v. Woodruff, 60 N. Y. 73; Mechanics' & Traders' Bank of Buffalo v. Farmers' & Mechanics' Nat. Bank of Buffalo, 60 N. Y. 40.

<sup>31</sup> Rosenbaum v. Hayes, 10 N. D. 311, 86 N. W. 973; Boise v. Talcott (D. C.) 212 Fed. 268; Marine Bank of Chicago v. Wright, 48 N. Y. 1.

When goods are loaded upon the factor's drays, his lien is complete against attaching creditors of the owner. Burrus v. Kyle, 56 Ga. 24. Actual possession of the cargo of a ship may be obtained without unloading. Rice v. Austin, 17 Mass. 197.

<sup>32</sup> See Mechem, Ag. (2d Ed.) § 2563.

The right of the consignor to substitute another consignee is in some of the cases put on the ground of his right of stoppage in transitu. Jordan v. James, 5 Ohio, 88; The Merrimack, 8 Cranch, 317, 329, 3 L. Ed. 575.

<sup>33</sup> Lewis v. Galena & C. U. R. Co., 40 Ill. 281; Strahorn v. Union Stock Yard & Transit Co., 43 Ill. 424, 92 Am. Dec. 142; Ryberg v. Snell, 2 Wash. C. C. 294, 403, Fed. Cas. Nos. 12,189, 12,190; Bonner v. Marsh, 10 Smedes &

bill of lading for the goods is held by a third person as a pledgee for a valuable consideration.<sup>34</sup> If actual custody of the goods is obtained by the factor wrongfully, his lien does not attach.<sup>35</sup> Thus, where the bill of lading is sent attached to a draft on the factor, if he refuses to accept the draft, his retention of the bill of lading will give him no lien for his general balance, though, by means of the bill, he obtains the goods.<sup>36</sup> But, when the factor makes advances on the faith of the consignment of designated goods, his lien attaches on their delivery to the carrier.<sup>37</sup> Some cases so hold when the factor makes no new advance, but the goods are consigned under a special agreement to do so in payment on a general balance.<sup>38</sup> To the proposition that the lien attaches in these cases, there are some contra de-

M. (Miss.) 376, 48 Am. Dec. 754. A delivery of property to a carrier by the owner, to be shipped to another point, not the place of business of the factor, and the taking by the owner from the carrier of a bill of lading in the name of such factor, and forwarding it to him, are not conclusive on the question of the intent of the owner to deliver possession to the factor, where there are other facts in the case tending to show that it was not the purpose of the owner to surrender possession to the factor, but that the object of shipping in the name of the factor was to obtain the benefit of a through rate, which could not be obtained if the shipment was made part of the way in the name of the owner, and thereafter the balance of the distance to the place of business of the factor in his name. *Rosenbaum v. Hayes*, 5 N. D. 476, 67 N. W. 951; *National Bank of D. O. Mills & Co. v. Porter*, 73 Cal. 430, 11 Pac. 693, 15 Pac. 53.

<sup>34</sup> *Marine Bank of Chicago v. Wright*, 48 N. Y. 1; *First Nat. Bank of Chicago v. Bayley*, 115 Mass. 228; *Davenport Nat. Bank v. Homeyer*, 45 Mo. 145, 100 Am. Dec. 363; *First Nat. Bank of Batavia v. Ege*, 109 N. Y. 120, 16 N. E. 317, 4 Am. St. Rep. 431.

<sup>35</sup> *Winter v. Coit*, 7 N. Y. 288, 57 Am. Dec. 522; *Bank of Rochester v. Jones*, 4 N. Y. 497, 55 Am. Dec. 290; *Marine Bank of Chicago v. Wright*, 48 N. Y. 1; *Davenport Nat. Bank v. Homeyer*, 45 Mo. 145, 100 Am. Dec. 363; *Bruce v. Wait*, 3 Mees. & W. 15.

<sup>36</sup> *Allen v. Williams*, 12 Pick. (Mass.) 297; *Bank of Rochester v. Jones*, 4 N. Y. 497, 55 Am. Dec. 290; *Winter v. Coit*, 7 N. Y. 288, 57 Am. Dec. 522.

<sup>37</sup> *Bailey v. Hudson R. R. Co.*, 49 N. Y. 70; *Holbrook v. Wight*, 24 Wend. (N. Y.) 169, 35 Am. Dec. 607; *Jordan v. James*, 5 Ohio, 88; *Hardeman v. De Vaughn*, 49 Ga. 596; *Elliott v. Cox*, 48 Ga. 39; *Desha v. Pope*, 6 Ala. 690. And see *Valle v. Cerre's Adm'r*, 36 Mo. 575, 88 Am. Dec. 161. Where acceptances were made on the credit of a consignment the destination of which was subsequently changed by the consignor, the factor cannot enforce his claim for a lien if the drafts have been paid by the consignor before the suit is brought, and the factor thus relieved from liability. *Woodruff v. Nashville & C. R. Co.*, 2 Head (Tenn.) 87.

That notice of shipment to the consignee is necessary, see *Lewis v. Galena & C. U. R. Co.*, 40 Ill. 281. Contra: *Hardeman v. De Vaughn*, 49 Ga. 596.

<sup>38</sup> *Clark v. Mauran*, 3 Paige (N. Y.) 373; *Wade v. Hamilton*, 30 Ga. 450; *Davis v. Bradley*, 28 Vt. 118, 65 Am. Dec. 226. And see *Brown v. Wiggins*, 16 N. H. 312; *Desha v. Pope*, 6 Ala. 690, 41 Am. Dec. 76.

cisions.<sup>39</sup> As long as the goods remain in the possession of the principal, the factor acquires no lien.<sup>40</sup>

### *How Lien Lost*

A factor's lien continues only while the factor himself has the possession, and therefore if he pledges the goods for his own debt, or suffers them to be attached, or otherwise parts with them voluntarily, the lien is lost, and the owner may trace and recover them, or he may sue in trespass if they are forcibly taken; for he has constructive possession notwithstanding the lien.<sup>41</sup> None but the factor himself can set up this privilege against the owner. It is a personal privilege of the factor, and cannot be transferred, nor can the question upon it arise between any but the principal and factor.<sup>42</sup> But, unless the factor does some act which amounts to a relinquishment of his lien, he cannot be deprived of it by the creditors of the principal.<sup>43</sup> The death of the principal while the goods are in transit will not defeat a factor's lien which had attached.<sup>44</sup> If the property be voluntarily delivered, the lien is extinguished, and cannot be reasserted.<sup>45</sup> But if the

<sup>39</sup> *Saunders v. Bartlett*, 12 Heisk. (Tenn.) 316; *Kinloch v. Craig*, 3 Term R. 119.

<sup>40</sup> *Oliver v. Moore*, 12 Heisk. (Tenn.) 482. And see *Baker v. Fuller*, 21 Pick. (Mass.) 318. Where goods were shipped to the consignor's agent, to be by him delivered to the factor, his lien was held not to have attached. *Brown v. Wiggin*, 16 N. H. 312.

<sup>41</sup> *Holly v. Huggeford*, 8 Pick. (Mass.) 73, 19 Am. Dec. 303; *Jarvis v. Rogers*, 15 Mass. 389; *Jones v. Sinclair*, 2 N. H. 319, 9 Am. Dec. 75; *Daubigny v. Duval*, 5 Term R. 606. A commission merchant advanced money to his principal on his endorsement, and charged the note upon which the advance was made in his general account. Held, that the mere charging of the note to the principal did not entitle the latter to its possession. The agent had a right to retain it as his principal's property until he was paid the balance of his general account arising in the course of their dealings. *Myer v. Jacobs*, 1 Daly (N. Y.) 32. Taking a note from the principal is not a waiver of the lien. *Story v. Flournoy*, 55 Ga. 56. But see *Darlington v. Chamberlain*, 20 Ill. App. 443, where taking a judgment note was held a waiver. That neglect to enforce the lien will operate as a waiver, see *Grieff v. Cowguill*, 2 Disn. (Ohio) 58.

<sup>42</sup> *Holly v. Huggeford*, 8 Pick. (Mass.) 73, 19 Am. Dec. 303; *Barnes Safe & Lock Co. v. Bloch Bros. Tobacco Co.*, 38 W. Va. 158, 18 S. E. 482, 22 L. R. A. 850, 45 Am. St. Rep. 846; *Jones v. Sinclair*, 2 N. H. 321, 9 Am. Dec. 75; *Ames v. Palmer*, 42 Me. 197, 66 Am. Dec. 271; *Daubigny v. Duval*, 5 Term R. 606. The personal representatives of a deceased factor may enforce his lien. *Gage v. Allison*, 1 Brev. (S. C.) 495, 2 Am. Dec. 682.

<sup>43</sup> *Eaton v. Truesdail*, 52 Ill. 307; *White Mountain Bank v. West*, 46 Me. 15; *Baugh v. Kirkpatrick*, 54 Pa. 84, 93 Am. Dec. 675; *Barnett v. Warren*, 82 Ala. 557, 2 South. 457; *Bard v. Stewart*, 3 T. B. Mon. (Ky.) 72.

<sup>44</sup> *Hammonds v. Barclay*, 2 East, 227.

<sup>45</sup> *Sawyer v. Lorillard*, 48 Ala. 332; *Lickbarrow v. Mason*, 6 East, 22; *Bligh v. Davies*, 28 Beav. 211; *Hillman v. New York State Steel Co.*, 231 Fed. 936, 146 C. C. A. 132.

delivery be special, so that the factor still retains the control of the property, the lien is not relinquished.<sup>46</sup>

A factor cannot stop property in transitu, where he has voluntarily delivered up the possession of it, on any pretense that he has a lien upon it for advances made on account of the principal. Having parted with the possession of the property, he has relinquished his lien, and cannot reassert it. The owner may, in some cases, regain the possession of property sold and delivered by him, and hold it until the payment of the consideration shall be received. But this cannot be done by a factor whose interest is special and connected with the possession.<sup>47</sup> If a factor has a lien on goods, but, when they are demanded of him, places his refusal to deliver on some other ground than that of his right to a lien, he waives the lien.<sup>48</sup> The lien may, of course, be waived by express contract before or after it has attached.<sup>49</sup> The principal may at any time discharge the lien by tendering the balance due the factor, and securing him against acceptances or other outstanding liabilities incurred for the principal.<sup>50</sup>

### *How Lien Enforced*

We have already seen<sup>51</sup> that a factor may sell enough of the goods in his hands to satisfy his lien, and that he may so sell against the orders of the principal as to time and price, if he first gives notice to the principal to redeem.<sup>52</sup> If, after the sale, a balance remains due the factor, he may proceed against the principal personally.<sup>53</sup> The factor

<sup>46</sup> *Matthews v. Menedger*, 2 McLean, 145, Fed. Cas. No. 9,289; *Winne v. Hammond*, 37 Ill. 99; *Jordan v. James*, 5 Ohio, 88; *Davis v. Bradley*, 28 Vt. 118, 65 Am. Dec. 226. A factor, having a lien on goods consigned to him by virtue of an agreement with his principal, does not preclude himself from insisting on his lien by holding out his principal as the owner of the goods. *Seymour v. Hoadley*, 9 Conn. 418. The conveyance by a principal cannot destroy or impair any lien which the factor had previously acquired. *Bard v. Stewart*, 3 T. B. Mon. (Ky.) 72.

<sup>47</sup> *Matthews v. Menedger*, 2 McLean, 145, Fed. Cas. No. 9,289.

<sup>48</sup> *Winter v. Coit*, 7 N. Y. 288, 57 Am. Dec. 522.

<sup>49</sup> *Schiffer v. Feagin*, 51 Ala. 335.

But a waiver is not readily inferred. *Harrison v. Mora*, 150 Pa. 481, 24 Atl. 705.

<sup>50</sup> *Beebe v. Mead*, 33 N. Y. 587; *Gage v. Allison*, 1 Brev. (S. C.) 495, 2 Am. Dec. 682; *Jones v. Tarleton*, 9 Mees. & W. 675.

<sup>51</sup> Ante, p. 165. A factor, while indebted to his principal, cannot sell the property of the principal to pay obligations on account of the factorage. *Alexander v. Morris*, 3 Call (Va.) 89.

<sup>52</sup> *Miller v. Price* 4 Cal. Unrep. Cas. 983, 39 Pac. 781; *Weed v. Adams*, 37 Conn. 378; *Marfield v. Douglass*, 3 N. Y. Super. Ct. 360.

<sup>53</sup> *Whitman v. Horton*, 46 N. Y. Super. Ct. 531; *Gihon v. Stanton*, 9 N. Y. 476; *Corlies v. Cumming*, 6 Cow. (N. Y.) 184; *Mottram v. Mills*, 4 N. Y. Super. Ct. 189.

is not, however, confined to this remedy. He may have his lien foreclosed in equity, and will be entitled to a decree for any deficiency that may remain.<sup>54</sup>

## SAME—RIGHTS AGAINST THIRD PERSONS

### 17. A factor may maintain actions against third persons on contracts of sale made by him, and for injuries to the goods of his principal.

A factor, in selling the goods of his principal, acquires contract rights against the vendee, and may sue him for the price of the goods sold,<sup>55</sup> or for breach of the contract of sale,<sup>56</sup> being accountable to his principal for the amount recovered. As will be seen later,<sup>57</sup> the principal also has a right to sue the purchaser; and a recovery by him will bar an action by the factor.<sup>58</sup> But, when the factor has a lien on the proceeds of the sale, the principal cannot cut off the factor's rights therein.<sup>59</sup> If the factor gives the purchaser notice of his lien, payment by the latter to the principal will not relieve him of liability to the factor.<sup>60</sup> When a factor sues a purchaser on the contract of sale, the latter may avail himself of any defenses which he has against the principal<sup>61</sup> or against the factor;<sup>62</sup> but the purchaser is not allowed to

<sup>54</sup> *Whitman v. Horton*, 46 N. Y. Super. Ct. 531; *Gihon v. Stanton*, 9 N. Y. 476; *Denney v. Wheelwright*, 60 Miss. 733; *Strong v. Stewart*, 9 Heisk. (Tenn.) 137.

<sup>55</sup> *Toland v. Murray*, 18 Johns. (N. Y.) 24; *White v. Chouteau*, 10 Barb. (N. Y.) 202; *Ilsley v. Merriam*, 7 Cush. (Mass.) 242, 54 Am. Dec. 721; *Girard v. Taggart*, 5 Serg. & R. (Pa.) 19, 9 Am. Dec. 327; *Graham v. Duckwall*, 8 Bush (Ky.) 12; *Miller v. Lea*, 35 Md. 396, 6 Am. Dec. 417; *Sadler v. Leigh*, 4 Camp. 195. The factor may collect, in his own name, notes for his principal's goods, which are payable to himself. *Van Staphorst v. Pearce*, 4 Mass. 258. The factor may maintain an action against a warehouseman for a breach of his contract to store the goods. *Allen v. Steers*, 39 La. Ann. 586, 2 South. 199. But a factor cannot maintain an action against a carrier for delay in transportation when his lien has not attached. *Cobb v. Illinois Cent. R. Co.*, 88 Ill. 394; *Smith & Son v. Bloom*, 159 Iowa, 592, 141 N. W. 32; *Progress Blue Ribbon Farms v. Chicago Horse Sales Co.*, 153 Wis. 249, 140 N. W. 1132.

<sup>56</sup> *Groover v. Warfield*, 50 Ga. 644.

<sup>57</sup> Post, p. 184.

<sup>58</sup> *Kelley v. Munson*, 7 Mass. 319, 5 Am. Dec. 47; *Golden v. Levy*, 4 N. C. 141, 1 Car. Law Repos. 527, 6 Am. Dec. 555.

<sup>59</sup> *Hudson v. Granger*, 5 Barn. & Ald. 27.

<sup>60</sup> Story, Ag. § 424; *Drinkwater v. Goodwin*, Comp. 251.

<sup>61</sup> *Grice v. Kenrick*, L. R. 5 Q. B. 344.

<sup>62</sup> *Gibson v. Winter*, 5 Barn. & Adol. 96; *Hudgins Produce Co. v. J. R. Beggs & Co.* (Tex. Civ. App.) 185 S. W. 339.

avail himself of set-offs against the principal to an extent that would defeat the factor's lien.<sup>63</sup>

It has been seen that a factor has a special property in the goods of his principal, so far as they come to his hands. This is by virtue of his lien. This special property gives him the right to sue for and recover it if illegally dispossessed,<sup>64</sup> or to maintain trespass for injury it may sustain by a wrongdoer, precisely as if he was the general owner.<sup>65</sup> Nor can a tortfeasor question his title.<sup>66</sup> When the factor sues a stranger for a conversion of the principal's goods, the measure of damages is the value of the goods. But when he sues the principal or some one standing in the principal's place, as an attaching creditor, the recovery is limited to the value of the factor's special property; that is, to the amount of his lien.<sup>67</sup>

### SAME—LIABILITIES TO THIRD PERSONS

18. A factor may be liable in contract to purchasers from him, or for conversion to the real owners of goods wrongfully consigned to him.

The liability of factors to third persons with whom they contract in relation to the business of their agency is the same as that of other

<sup>63</sup> *Drinkwater v. Goodwin*, Cowp. 251.

<sup>64</sup> *Winne v. Hammond*, 37 Ill. 99; *Holbrook v. Wight*, 24 Wend. (N. Y.) 169, 35 Am. Dec. 607; *Ladd v. Arkell*, 37 N. Y. Super. Ct. 35; *Gorum v. Carey*, 1 Abb. Prac. (N. Y.) 285; *Fitzhugh v. Wiman*, 9 N. Y. 559. He may maintain replevin for the goods, even against an officer who has attached them on precept against the general owner. His consent to become keeper of the goods for the attaching officer does not defeat his right to maintain such action of replevin. *Sewall v. Nichols*, 34 Me. 582.

<sup>65</sup> *U. S. v. Villalonga*, 23 Wall. 35, 23 L. Ed. 64; *Fitzhugh v. Wiman*, 9 N. Y. 559; *Gorum v. Carey*, 1 Abb. Prac. (N. Y.) 285; *Robinson v. Webb*, 11 Bush (Ky.) 464; *Beyer v. Bush*, 50 Ala. 19. Where buildings are destroyed to arrest a conflagration, a factor may claim damages for goods destroyed, to the amount of his lien for charges, etc., but he cannot claim the value of the goods for the benefit of the owner. *Mayor, etc., of City of New York v. Stone*, 20 Wend. (N. Y.) 139; *Stone v. Mayor, etc., of City of New York*, 25 Wend. (N. Y.) 157. An action for conversion will lie at suit of a factor who has stored property consigned to him with a third party, from whose possession it has been taken by a wrongdoer. The right of action does not depend upon the fact of possession; it grows out of the right to the possession. *Gorum v. Carey*, 1 Abb. Prac. (N. Y.) 285; *Exchange Bank v. Horne-Andrews Commission Co.*, 145 Ga. 870, 90 S. E. 55; *Smith v. Maine Cent. R. Co.*, 114 Me. 474, 96 Atl. 778.

<sup>66</sup> *Winne v. Hammond*, 37 Ill. 99.

<sup>67</sup> *Heard v. Brewer*, 4 Daly (N. Y.) 136.

agents making contracts on behalf of principals who are disclosed or undisclosed.<sup>68</sup>

### *Liability for Conversion*

The correct rule to determine the liability of a factor who has in good faith sold goods which did not belong to the principal is involved in some doubt. This is owing, probably, to the confusion which exists in the law as to what constitutes conversion. If a factor receives a consignment of goods from one having no right to sell them, and the factor sells them, and pays over the proceeds to his principal without notice of the true owner's rights, he is not liable for a conversion.<sup>69</sup> But, if he refuses to comply with a demand of the true owner while the goods or their proceeds are in his possession, he becomes liable for their value.<sup>70</sup> So, if he has constructive notice in any way that they do not belong to the principal, he is liable.<sup>71</sup> And it has been held

<sup>68</sup> *McCullough v. Thompson*, 45 N. Y. Super. Ct. 449; *Johnson v. McCampbell*, 6 Baxt. (Tenn.) 294. When the proceeds of a sale made by the factor are appropriated by the principal, with the consent of the factor, to the use of a creditor of the principal, the factor is bound to hold the proceeds for that purpose. *Lowery v. Steward*, 25 N. Y. 239, 82 Am. Dec. 346. Where a consignor directs the proceeds of certain bales of cotton to be applied by his factor in payment of a specific debt of his son, he is warranted in countermanding the direction at any time before the factor has thus appropriated the money, or entered into an agreement with the creditor who is the object of the remittance to hold it for his use. *Walton v. Tims*, 7 Ala. 470. A factor has the right to pay the proceeds of property sold by him to the owner, although he may know that the owner has promised them to his creditors. *Pearce v. Roberts*, 27 Mo. 179. A factor who sells oil, with a warranty of quality, without designating himself as "agent," is personally liable on the warranty, although he has settled with his principal before notice of the breach, and although the vendee was informed before action brought that the factor was not acting for himself. *Hastings v. Lovering*, 2 Pick. (Mass.) 214, 13 Am. Dec. 420.

<sup>69</sup> *Abernathy v. Wheeler*, 92 Ky. 320, 17 S. W. 858, 36 Am. St. Rep. 593; *Roach v. Turk*, 9 Heisk. (Tenn.) 708, 24 Am. Rep. 360, overruling *Taylor v. Pope*, 5 Cold. (Tenn.) 413.

These cases are of doubtful authority. See *Mechem*, Ag. (2d Ed.) § 2583, where it is said that the weight of authority is to the contrary. See *Johnson v. Martin*, 87 Minn. 370, 92 N. W. 221, 59 L. R. A. 733, 94 Am. St. Rep. 706; *Robinson v. Bird*, 158 Mass. 357, 33 N. E. 391, 35 Am. St. Rep. 495; *White & Co. v. Century Sav. Bank of Des Moines*, Iowa, 229 Fed. 975, 144 C. C. A. 257.

<sup>70</sup> *Roach v. Turk*, 9 Heisk. (Tenn.) 708, 24 Am. Rep. 360. A factor notified that cotton consigned to him by a third person belongs to plaintiffs, and directed not to pay over the proceeds without their consent, is liable for any subsequent payment to the consignor, not depending upon a superior right. *Ledoux v. Anderson*, 2 La. Ann. 558; *Ledoux v. Cooper*, Id. 586.

<sup>71</sup> As where there is a chattel mortgage on a growing crop, duly recorded, or where the factor knows facts which give him implied notice of a landlord's lien on them, he is liable for conversion if he sells the crop, and pays the pro-

that a factor who makes advances on goods which his principal had no right to consign to him asserts a special property therein, adverse to the claim of the true owner, and thereby becomes liable for conversion, though he has sold the goods to satisfy his advances, or has returned them to the principal on the latter repaying the advances.<sup>72</sup>

## RIGHTS AND LIABILITIES OF PRINCIPALS AND THIRD PERSONS

19. Principals may maintain actions on the contracts made by their factors, and for injuries to their property in the hands of their factors. They are liable on the contracts made for them with third persons.

A principal may, of course, sue on contracts made by the factor,<sup>73</sup> whether the purchaser knew at the time of the sale that he was dealing with a factor or not.<sup>74</sup> The principal's right to recover the purchase price is, however, limited in two ways: First, as already seen, his right of action is subject to the factor's lien on the proceeds of the sale;<sup>75</sup> and, second, when the principal was not disclosed, the purchaser can set off against him any claims he may have acquired against the factor, up to the time he received notice of the rights of the principal.<sup>76</sup> If the purchaser knew at the time of the sale that he was

ceeds to his principal. *Merchants' & Planters' Bank v. Meyer*, 56 Ark. 499, 20 S. W. 406.

<sup>72</sup> *Newcomb-Buchanan Co. v. Baskett*, 14 Bush (Ky.) 658. And see *Hollins v. Fowler*, L. R. 7 H. L. 757.

<sup>73</sup> *Ilsley v. Merriam*, 7 Cush. (Mass.) 242, 54 Am. Dec. 721; *Leverick v. Meigs*, 1 Cow. (N. Y.) 645; *Kelley v. Munson*, 7 Mass. 319, 5 Am. Dec. 47; *Merrick's Estate*, 5 Watts & S. (Pa.) 9.

<sup>74</sup> *Locke v. Lewis*, 124 Mass. 1, 26 Am. Rep. 631; *Roosevelt v. Doherty*, 129 Mass. 301, 37 Am. Rep. 356; *Girard v. Taggart*, 5 Serg. & R. (Pa.) 19, 9 Am. Dec. 327; *Miller v. Lea*, 35 Md. 396, 6 Am. Dec. 417; *Ladd v. Arkell*, 40 N. Y. Super. Ct. 150.

<sup>75</sup> Ante, p. 181. A factor may make an entire contract for the sale of his own goods and those of a principal, or for the sale of goods of two or more principals. In such case no action can be maintained for part of the goods unless the contract made by the factors has been performed. *Roosevelt v. Doherty*, 129 Mass. 301, 37 Am. Rep. 356. So, where the factor takes one note for such a sale, it operates to suspend the right of action of any of the principals until the expiration of the credit given by the factor in taking the note. *Hapgood v. Batcheller*, 4 Metc. (Mass.) 573; *Merrill v. Thomas*, 7 Daly (N. Y.) 393.

<sup>76</sup> *Locke v. Lewis*, 124 Mass. 1, 26 Am. Rep. 631; *Barry v. Page*, 10 Gray (Mass.) 398; *Huntington v. Knox*, 7 Cush. (Mass.) 371; *Hogan v. Shorb*, 24 Wend. (N. Y.) 458; *Merrick's Estate*, 5 Watts & S. (Pa.) 9; *Parker v. Donaldson*, 2 Watts & S. (Pa.) 9; *Gardner v. Allen's Ex'r*, 6 Ala. 187, 41 Am. Dec. 45. But see *Brown v. Morris*, 83 N. C. 251.



dealing with a factor as such, he cannot set up any claims on the factor against the principal.<sup>77</sup> The special property which a factor acquires by reason of his lien does not deprive the principal, as general owner, of his right to maintain actions for the injury or conversion of his goods.<sup>78</sup> He may recover them or their value when they have been taken on judicial process against the factor.<sup>79</sup> The principal may follow the goods or their proceeds in the hands of third persons to whom the factor has disposed of them in some way in which he had no power to do so, as where the factor has loaned the proceeds of the goods to one who knew the fact.<sup>80</sup>

<sup>77</sup> *Ladd v. Arkell*, 40 N. Y. Super. Ct. 150; *Guy v. Oakley*, 13 Johns. (N. Y.) 332; *Darlington v. Chamberlain*, 120 Ill. 585, 12 N. E. 78; *St. Louis Nat. Bank v. Ross*, 9 Mo. App. 399; *George v. Clagett*, 7 Term R. 359; *Catterall v. Hindle*, L. R. 1 C. P. 186; *Dresser v. Norwood*, 17 C. B. (N. S.) 466; *Carr v. Hinchliff*, 4 Barn. & C. 547. Though the purchaser knew that the person he was dealing with was engaged in the business of selling goods on commission, that is not notice that he sold as a factor in that transaction. He may presume that he is selling his own goods. *Schell v. Stephens*, 50 Mo. 379. But see *Miller v. Lea*, 35 Md. 396, 6 Am. Dec. 417; *Stewart v. Woodward*, 50 Vt. 78, 28 Am. Rep. 488.

<sup>78</sup> *Mechem*, Ag. (2d Ed.) § 2576.

<sup>79</sup> *Holly v. Huggeford*, 8 Pick. (Mass.) 73, 19 Am. Dec. 303; *Moore v. Hilbrans*, 16 Abb. (Mass.) 159, 28 Am. Dec. 477; *Loomis v. Barker*, 69 Ill. 360; *Ellsner v. Radcliff*, 21 Ill. App. 195; *National Cordage Co. v. Sims*, 44 Neb. 148, 62 N. W. 514; *Barnes Safe & Lock Co. v. Bloch Bros. Tobacco Co.*, 38 W. Va. 158, 18 S. E. 482, 22 L. R. A. 850, 45 Am. St. Rep. 846.

<sup>80</sup> *Sheffer v. Montgomery*, 65 Pa. 329. But cf. *Lime Rock Bank v. Plimpton*, 17 Pick. (Mass.) 159, 28 Am. Dec. 286. And see generally, as to following goods, *Farmers' & Mechanics' Nat. Bank v. King*, 57 Pa. 202, 98 Am. Dec. 215; *Pitts v. Mower*, 18 Me. 361, 36 Am. Dec. 727; *Potter v. Dennison*, 10 Ill. (5 Gilman) 590; *Kelley v. Munson*, 7 Mass. 319, 5 Am. Dec. 47; *Veil v. Mitchel*, 4 Wash. C. C. 105, Fed. Cas. No. 16,908; *Thompson v. Perkins*, 3 Mason, 232, Fed. Cas. No. 13,972; *Fahnestock v. Bailey*, 3 Metc. (Ky.) 48, 77 Am. Dec. 161. The principal may recover the proceeds of his goods in the hands of a bank with which they have been deposited by the factor in an account separate from his general banking account. *Baker v. New York Nat. Exch. Bank*, 100 N. Y. 31, 2 N. E. 452, 53 Am. Rep. 150; *Richardson v. St. Louis Nat. Bank*, 10 Mo. App. 246. Where the factor mingles the proceeds of sale of his principal's goods with his general funds, the principal cannot follow them. *Price v. Ralston*, 2 Dall. 60, 1 L. Ed. 289. When a factor assigns his principal's open account against a purchaser, before its maturity, and without a demand on the principal to reimburse him for advances, the assignee acquires no right to the account against the principal. *Commercial Nat. Bank v. Heilbronner*, 108 N. Y. 439, 15 N. E. 701. Where a factor delivers goods of his principal in payment of his own debt, the principal may recover them, notwithstanding he is indebted to the factor to an amount as great as the value of the goods. *Benny v. Pegram*, 18 Mo. 191, 59 Am. Dec. 298. If a factor to whom goods are consigned pledges them as owner, the owner of the goods has an immediate right of action against the pledgee for the goods or their value, though the pledgee is

The rights of third persons against principals are the correlatives of the powers of the factors. These have already been discussed.<sup>81</sup> A purchaser from a factor may maintain an action against the principal for nonperformance of the contract of sale,<sup>82</sup> or for breach of warranty<sup>83</sup> if the warranty was one which the factor had power to make.<sup>84</sup> Goods sold by the factor within the scope of his powers cannot be recovered by the principal from the purchaser, though the factor has violated his instructions.<sup>85</sup> The implied powers of a factor cannot be limited, as against purchasers, by secret instructions.<sup>86</sup>

## TERMINATION OF THE RELATION

### 20. The relation of principal and factor is terminated

- (a) By the expiration of the time for which the agency was created.
- (b) By the sale of all the goods consigned.
- (c) By notice by either party.
- (d) By the death of either party.

**EXCEPTION**—The principal cannot terminate the relation, so as to deprive the factor of his special property in the goods.

The relation of principal and factor continues until the goods consigned to the factor are sold, and the accounts settled, unless the agency is sooner terminated by expiration of the time for which it was

innocent; and the pledgee cannot reduce the amount of judgment against him by exhibiting the accounts between the owner and the factor. *Bonito v. Mosquera*, 15 N. Y. Super. Ct. 401. A party receiving of a factor goods of his principal, in payment of or as security for a previous debt due him from the factor, is liable to account to the principal for the goods, although he did not know that they belonged to the principal. *Warner v. Martin*, 11 How. 209, 13 L. Ed. 667. In an action by a shipper against a carrier for damage to goods consigned to a factor, evidence that drafts drawn by the plaintiff for more than the value of the goods had been accepted and paid by the consignee was properly excluded. *Hill v. Georgia, C. & N. R. Co.*, 43 S. C. 461, 21 S. E. 337. See, also, *Union Stockyards Nat. Bank v. Gillespie*, 137 U. S. 411, 11 Sup. Ct. 118, 34 L. Ed. 724; *Britton v. Ferrin*, 171 N. Y. 235, 63 N. E. 954.

<sup>81</sup> Ante, p. 152.

<sup>82</sup> *Higgins v. McCrea*, 116 U. S. 671, 6 Sup. Ct. 557, 29 L. Ed. 764. The authority of factors and brokers acting in the line of their employment cannot be limited by private instructions not known to the party dealing with them. *Lobdell v. Baker*, 1 Metc. (Mass.) 193, 35 Am. Dec. 358.

<sup>83</sup> *Schuchardt v. Allen*, 1 Wall. 359, 17 L. Ed. 642; *Andrews v. Kneeland*, 6 Cow. (N. Y.) 354; *Randall v. Kehler*, 60 Me. 37, 11 Am. Rep. 169.

<sup>84</sup> See ante, p. 155.

<sup>85</sup> *Dias v. Chickering*, 64 Md. 348, 1 Atl. 709, 54 Am. Rep. 770.

<sup>86</sup> *Lobdell v. Baker*, 1 Metc. (Mass.) 193, 35 Am. Dec. 358.

created, or in some other manner in which agencies are terminated.<sup>87</sup> In the absence of a contrary agreement, a factor may put an end to the relation at any time; but he should give reasonable notice to the principal, and afford him an opportunity to take charge of any goods remaining in the factor's hands. The principal may also terminate the agency at any time, by reimbursing the factor for advances made and liabilities incurred; otherwise, the factor may retain the principal's goods under his lien, and, as has been seen, sell enough to satisfy his charges.<sup>88</sup> The death of either the factor or the principal terminates the relation except as to the special property of the factor. This is not affected, and a factor may, after the principal's death, sell to satisfy his lien.<sup>89</sup>

<sup>87</sup> *Scott v. Rogers*, 31 N. Y. 676; *Owensboro Wagon Co. v. H. L. Riggan & Co.*, 151 N. C. 303, 66 S. E. 126; *Williams v. Parrott & Co.*, 21 Cal. App. 73, 159 Pac. 824.

<sup>88</sup> *Ante*, p. 165; *Outerbridge v. Campbell*, 87 App. Div. 597, 84 N. Y. Supp. 537.

<sup>89</sup> *Hammonds v. Barclay*, 2 East, 227. And see *Jackson Ins. Co. v. Partee*, 9 Heisk. (Tenn.) 296; *Knapp v. Alvord*, 10 Paige (N. Y.) 205, 40 Am. Dec. 241.



# BROKERS

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19. Real Estate Brokers.
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22. Stock Brokers.
23. Ship Brokers.
24. Insurance Brokers.
25. Custom House Brokers.

## BROKER DEFINED

1. A broker is an agent who, for a commission and usually in the name of a principal, negotiates commercial contracts, including the purchase and sale of real and personal property. Brokers do not have possession of the property sold by them, except—

**EXCEPTIONS**—Stock and bill brokers may have possession of the property.

It is difficult to find a definition of a broker which is accurate and yet specific enough to be of any value as a definition.<sup>1</sup> The term "broker" is applied in commercial transactions to such a variety of diverse occupations that it is difficult to formulate rules which will

<sup>1</sup> See Black, Law Dict. tit. "Broker." A person engaged in selling on commission, in a city, merchandise by sample for his several principals, having an office where his samples are exhibited, is a local commercial broker, though he makes special arrangements in advance with those by whom he is employ-

govern the rights and liabilities of brokers as a class. Certain classes of brokers, such as bill brokers and stock brokers, are, more accurately speaking, factors; but their designation as brokers has become unalterably fixed in commercial usage. The possession of the goods is what distinguishes the factor from the selling broker.

On the other hand, the so-called "purchasing factor" is in reality a broker.<sup>2</sup> Pawnbrokers who loan their own money on the security of personal property are not brokers at all, but are principals in the business.<sup>3</sup> A broker is, in general, one who buys or sells property for another. Real estate brokers are agents for the sale and purchase of real property. Merchandise brokers are those who deal in personal property of a corporeal nature. The principal classes of brokers dealing in incorporeal personalty are stock brokers, bill and note brokers, and exchange brokers. The business of brokers is not, however, confined to the purchase and sale of property. There are insurance brokers who negotiate the making of contracts of insurance as the agents of the insured.<sup>4</sup> Ship brokers, in addition to the buying and selling of ships, are agents for the making of charter parties.

While it is probable that a broker might receive his compensation otherwise than in the form of commissions, and still retain his character as a broker, yet a salaried agent buying bills of exchange with the money of his principal cannot be required to take out a broker's license.<sup>5</sup>

## ESTABLISHMENT OF RELATION

### 2. The relation of principal and broker is established in the same ways as other agencies.

The establishment of a broker's authority differs in no material respect from the creation of any ordinary agency.<sup>6</sup> A broker cannot, of course, bind by contract one whom he has no authority to repre-

ed, and is their sole representative in his city. *Stratford v. City Council of Montgomery*, 110 Ala. 619, 20 South. 127.

See, also, *Cooper's Glue Factory v. Devoe & Reynolds Co.*, 178 Ill. App. 298; *Spilo v. Baumann-McWhirter Chemical Co.*, 157 N. Y. Supp. 521; *Payne v. Ponder*, 139 Ga. 283, 77 S. E. 32. Distinguished from middleman. *Stapp & Hendrick v. Godfrey*, 158 Iowa, 376, 139 N. W. 893. Distinguished from servant. *McManama v. Dyer* (Mo. App.) 176 S. W. 1101.

<sup>2</sup> See *Factors*, p. 152.

<sup>3</sup> *City of Little Rock v. Barton*, 33 Ark. 436, 450.

<sup>4</sup> Insurance brokers are the agents of the insured; insurance agents are the agents of the insurer. *Hartford Fire Ins. Co. v. Reynolds*, 36 Mich. 502; *Miller v. Phoenix Insurance Co.*, 27 Iowa, 203, 1 Am. Rep. 262.

<sup>5</sup> *City of Portland v. O'Neill*, 1 Or. 218.

<sup>6</sup> A partnership may act as a broker. *Bromley v. Elliot*, 38 N. H. 287, 309,

sent. If the supposed principal subsequently ratifies the contract, the broker may become entitled to commissions.<sup>7</sup> But a broker cannot, by sending a purchaser to the owner of property, who has given the broker no authority to act for him, claim commissions if a sale is consummated. The broker must show an appointment as a broker, or he is not entitled to the rights arising out of the relation.<sup>8</sup>

Ordinarily, the authority of a broker may be granted by parol. Thus, a real estate broker, having no written authority, may sign a contract binding his principal to sell, and specific performance of the contract can be enforced against the principal.<sup>9</sup> In such a case, also, the broker, acting under a parol authority, can recover commissions.<sup>10</sup> But it is provided by statute in some states that an agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation shall be invalid unless some note or memorandum thereof is made in writing, and subscribed by the party to be charged, or by his agent.<sup>11</sup> Under such a statute, a broker who has no written authority cannot recover commissions, though the principal has completed the sale negotiated by the broker, either on the express oral contract or on a quantum meruit.<sup>12</sup>

75 Am. Dec. 182. The principal must be competent to contract. *Cavender v. Waddingham*, 5 Mo. App. 457; *Twelfth St. Market Co. v. Jackson*, 102 Pa. 269; *Keys v. Johnson*, 68 Pa. 42; *Holley v. Townsend*, 16 How. Prac. (N. Y.) 125; *Hinds v. Henry*, 36 N. J. Law, 328; *Burrows v. Standard Oil Co.*, 109 App. Div. 593, 96 N. Y. Supp. 370; *Axe v. Tolbert*, 179 Mich. 556, 146 N. W. 418.

<sup>7</sup> *Pierce v. Thomas*, 4 E. D. Smith (N. Y.) 354; *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 441; *Lyons v. Wait*, 51 N. J. Eq. 60, 26 Atl. 334.

<sup>8</sup> *Pierce v. Thomas*, 4 E. D. Smith (N. Y.) 354. And see post, p. 204.

<sup>9</sup> *Dickerman v. Ashton*, 21 Minn. 538; *Brown v. Eaton*, 21 Minn. 409; *Worral v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330.

<sup>10</sup> *Fiero v. Fiero*, 52 Barb. (N. Y.) 288; *Fischer v. Bell*, 91 Ind. 243.

<sup>11</sup> So in California, New Jersey, Oregon, Washington, and other states.

<sup>12</sup> *McCarthy v. Loupe*, 62 Cal. 299; *Myres v. Surryhue*, 67 Cal. 657, 8 Pac. 523; *Shanklin v. Hall*, 100 Cal. 26, 34 Pac. 636; *Mendenhall v. Rose*, 4 Cal. Unrep. 81, 33 Pac. 884. But see *Griffith v. Daly*, 56 N. J. Law, 466, 29 Atl. 169. Though Gen. Laws Minn. 1887, c. 26, requires the authority of an agent to sell land to be in writing, where an agent has performed his part of a parol contract to sell land he is entitled to his compensation thereunder. *Vaughan v. McCarthy*, 59 Minn. 199, 60 N. W. 1075; *McCartney v. Clover Valley Land & Stock Co.*, 232 Fed. 697, 146 C. C. A. 623; *McRae v. Ross*, 170 Cal. 74, 148 Pac. 215.

Some statutes require other contracts of agency to be in writing. See *McMurrin v. Duncan*, 17 Ariz. 552, 155 Pac. 306.

## LEGALITY OF OBJECT

3. Where a contract made by a broker is illegal, it cannot be enforced by the parties to it; nor can the broker recover for services and expenses if he was privy to the illegal intent.

When the business in which a broker is engaged is illegal, the contracts made through him are not enforceable by the parties to them. And, as in the case of other illegal contracts, the law leaves the parties as it finds them.<sup>13</sup> But, if the broker has money in his hands belonging to his principal, he cannot retain it on the ground that the transaction through which he received it was illegal.<sup>14</sup>

## IMPLIED POWERS OF BROKERS

4. A broker has such implied powers as are necessary, according to the usage of the business, to accomplish the object of the agency. These powers will be discussed under the following heads:

- (a) To act in his own name.
- (b) To fix price.
- (c) To sell on credit.
- (d) To warrant.
- (e) To sign contract for both parties.
- (f) To delegate authority.
- (g) To receive payment.
- (h) To rescind or submit to arbitration.

### *Power to Act in His Own Name*

According to the usage of business, brokers, as a general rule, make their contracts in the names of their principals.<sup>15</sup> But stockbrokers

<sup>13</sup> Clark, *Cont.* (3d Ed.) 430.

<sup>14</sup> *Tenant v. Elliott*, 1 Bos. & P. 3; *McBlair v. Gibbes*, 17 How. 232, 15 L. Ed. 132; *Armstrong v. Toler*, 11 Wheat. 258, 6 L. Ed. 468; *Com. v. Cooper*, 130 Mass. 285.

<sup>15</sup> *Saladin v. Mitchell*, 45 Ill. 79; *McKindly v. Dunham*, 55 Wis. 515, 13 N. W. 485, 42 Am. Rep. 740; *Evans v. Waln*, 71 Pa. 69; *Graham v. Duckwall*, 8 Bush (Ky.) 12; *Brown v. Morris*, 83 N. C. 254. When a broker, not intrusted with possession, contracts in his own name, payment to him will not relieve the purchaser from liability to the principal. *Crosby v. Hill*, 39 Ohio St. 100; *Higgins v. Moore*, 34 N. Y. 417; *DeLafield v. Smith*, 101 Wis. 664, 78 N. W. 170, 70 Am. St. Rep. 938.



usually act in their own names in buying and selling, and in many instances never disclose the names of their principals at all.<sup>16</sup>

*Powers Necessary to Accomplish Object*

When a broker is employed to conduct a negotiation, the principal, by implication, clothes him with all the powers which are usual and necessary for the successful transaction of the business. What these powers are will depend in each case on the nature of the broker's employment. Within the scope of his employment, he has power to bind his principal by whatever contract the carrying out of the latter's commission may require.<sup>17</sup>

*Powers Fixed by Usage*

The implied powers of brokers are fixed almost entirely by custom or usage. This is especially true when the broker is dealing in a regular market as a member of a board like a stock exchange or a board of trade. The rules of such body enter into all the contracts made by the broker, and are binding on his principal. A person who deals in a particular market must be taken to deal according to the known, general, and uniform custom or usage of that market; and he who employs another to act for him at a particular place or market must be taken as intending that his business shall be done according to the usage of that market, whether he in fact knew of the usage or not.<sup>18</sup> There are, however, certain reasonable limits to the powers which may be conferred by usage. No usage is admissible to control

<sup>16</sup> *Markham v. Jaudon*, 41 N. Y. 235; *Horton v. Morgan*, 19 N. Y. 170, 75 Am. Dec. 311; *Banta v. City of Chicago*, 172 Ill. 204, 50 N. E. 233, 40 L. R. A. 611.

<sup>17</sup> *Le Roy v. Beard*, 8 How. 451, 12 L. Ed. 1151; *Star Line v. Van Vliet*, 43 Mich. 364, 5 N. W. 418; *Saladin v. Mitchell*, 45 Ill. 79; *Craighead v. Peterson*, 72 N. Y. 279, 28 Am. Rep. 150; *McBean v. Fox*, 1 Ill. App. 177; *Benninghoff v. Agricultural Insurance Co. of Watertown*, 93 N. Y. 495; *Lawrence v. Gallagher*, 42 N. Y. Super. Ct. 309; *Benjamin v. Benjamin*, 15 Conn. 347, 39 Am. Dec. 384; *Huntley v. Mathias*, 90 N. C. 101, 47 Am. Rep. 516; *Hardee v. Hall*, 12 Bush (Ky.) 327; *Shackman v. Little*, 87 Ind. 181; *McAlpin v. Cassidy*, 17 Tex. 449; *Boyd v. Satterwhite*, 10 S. C. 45; *Bass Dry Goods Co. v. Granite City Mfg. Co.*, 119 Ga. 124, 45 S. E. 980.

<sup>18</sup> *Lyon v. Culbertson*, 83 Ill. 33, 25 Am. Rep. 349; *United States Life Ins. Co. v. Advance Co.*, 80 Ill. 549; *Bailey v. Bensley*, 87 Ill. 556; *Horton v. Morgan*, 19 N. Y. 170, 75 Am. Dec. 311; *Lawrence v. Maxwell*, 53 N. Y. 19; *Nourse v. Prime*, 4 Johns. Ch. (N. Y.) 490, 8 Am. Dec. 606; *Rosenstock v. Tormey*, 32 Md. 169, 3 Am. Rep. 125; *Durant v. Burt*, 98 Mass. 161; *Sumner v. Stewart*, 69 Pa. 321; *Sutton v. Tatham*, 10 Adol. & E. 27; *Bibb v. Allen*, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819.

But principal nonresident not bound by local custom of which he was ignorant. *American Sugar Refining Co. v. McGhee*, 96 Ga. 27, 21 S. E. 383. It is a question of presumable intention. See *Mechem, Ag.* (2d Ed.) §§ 2393, 2394,

rules of law<sup>19</sup> or the provisions of an express contract.<sup>20</sup> A usage which causes the broker to assume the relation of a principal to those employing him is invalid.<sup>21</sup> So, a principal is not bound by a usage of brokers when dealing with brokers in another city to put all the transactions between them into one account, and to settle the general balance.<sup>22</sup> Nor can a stock broker justify, on the authority of usage, a sale of stock held by him to secure advances, without notice to his principal.<sup>23</sup>

### *Power to Fix Price*

When a broker is ordered to sell or purchase property for his principal without any instructions as to the price, he has implied power to fix the price. This is ordinarily the case with merchandise and stock brokers. Their principals rely on them to get the best prices possible in the market. With purchasers and sales of real estate through brokers the price is almost always fixed by the principal, though, if a broker receives an order to buy or sell a certain piece of land, he would probably have power to fix the price. Whenever a broker fixes the price, it must be the market price if there is a market price, and, if not, the price must be reasonable, and the best that the broker could obtain.<sup>24</sup>

Where the agent has authority to make the contract of purchase or sale and is not a mere middleman, he has implied authority, as to innocent third persons, to fix the price.<sup>25</sup>

### *Power to Sell on Credit*

A broker has an implied power to sell on credit when such is the usage of the trade in which he is engaged, but not otherwise. The length of the credit depends, like the power itself, on that usage. Dealings on the stock market, however, are usually for cash; and therefore a stock broker cannot give credit without an express authority from his principal to do so.<sup>26</sup>

<sup>19</sup> *Wheeler v. Newbould*, 16 N. Y. 392; *Higgins v. Moore*, 34 N. Y. 417; *Bowen v. Newell*, 8 N. Y. 190; *Chilberg v. Lyng*, 128 Fed. 899, 63 C. C. A. 451.

<sup>20</sup> *Clark v. Baker*, 11 Metc. (Mass.) 186, 45 Am. Dec. 199; *Blackett v. Assurance Co.*, 2 Tyrw. 266; *Daugherty v. Leewright* (Tex. Civ. App.) 174 S. W. 841.

<sup>21</sup> *Robinson v. Mollett*, L. R. 7 H. L. 802.

<sup>22</sup> *Evans v. Waln*, 71 Pa. 69.

<sup>23</sup> *Allen v. Dykers*, 3 Hill (N. Y.) 593; *Wheeler v. Newbould*, 16 N. Y. 392; *Markham v. Jaudon*, 41 N. Y. 235; *Pickering v. Demeritt*, 100 Mass. 421; *Day v. Holmes*, 103 Mass. 306.

<sup>24</sup> *Daylight Burner Co. v. Odlin*, 51 N. H. 56, 12 Am. Rep. 45; *Bigelow v. Walker*, 24 Vt. 149, 58 Am. Dec. 156.

<sup>25</sup> *Bass Dry Goods Co. v. Granite City Mfg. Co.*, 119 Ga. 124, 45 S. E. 980. See *Principal and Agent*, p. 59, ante.

<sup>26</sup> *DeLafield v. Illinois*, 26 Wend. (N. Y.) 192; *Wiltshire v. Sims*, 1 Camp. 258; *Boorman v. Brown*, 3 Q. B. 511; *Dresden School District v. Aetna Ins. Co.*, 62

*Power to Warrant*

Whenever the custom of a particular trade is to give a warranty to purchasers, brokers dealing in that kind of property have an implied power to warrant. When there is no such usage, the power does not exist.<sup>27</sup> Thus, when a broker sells by sample, he may warrant the quality of the goods as equal to the sample.<sup>28</sup> But it has been held that a broker has no power to warrant against a latent defect present in the sample itself.<sup>29</sup>

*Power to Sign Contract for Both Parties*

Merchandise<sup>30</sup> and stock brokers,<sup>31</sup> when they make contracts for their principals, are, so far as the statute of frauds is concerned, agents for both parties. When so acting, they have authority to do all that is necessary to bind the bargain, and hence may sign the requisite memorandum.<sup>32</sup> In this country it is customary for the broker to make an entry of the sale in a book kept for that purpose, and such an entry, if it contains the terms of the bargain, is a sufficient memorandum,<sup>33</sup> nor need it be signed by the broker.<sup>34</sup> A note containing

Me. 330; *White v. Fuller*, 67 Barb. (N. Y.) 267; *Woods v. Wilson* (Iowa) 158 N. W. 495.

<sup>27</sup> *Ahern v. Goodspeed*, 72 N. Y. 108; *Nelson v. Cowing*, 6 Hill (N. Y.) 336; *Sturgis v. New Jersey Steamboat Co.*, 62 N. Y. 625. It is held in Massachusetts that evidence of usage is inadmissible to establish such implied power. *Dodd v. Farlow*, 11 Allen, 426, 87 Am. Dec. 726; *Boardman v. Spooner*, 13 Allen, 353, 90 Am. Dec. 196.

But see *Murray v. Smith*, 4 Daly (N. Y.) 277; *Caughran v. Stinespring*, 132 Tenn. 636, 179 S. W. 152, L. R. A. 1916C, 403 (broker's representation as to number of acres binding).

<sup>28</sup> *Andrews v. Kneeland*, 6 Cow. (N. Y.) 354; *Boorman v. Jenkins*, 12 Wend. (N. Y.) 566, 27 Am. Dec. 158; *Waring v. Mason*, 18 Wend. (N. Y.) 425.

<sup>29</sup> *Dickinson v. Gay*, 7 Allen (Mass.) 29, 83 Am. Dec. 656.

<sup>30</sup> *Suydam v. Clark*, 2 Sandf. (N. Y.) 133; *Peltier v. Collins*, 3 Wend. (N. Y.) 459, 20 Am. Dec. 711; *Davis v. Shields*, 26 Wend. (N. Y.) 341.

<sup>31</sup> *Colvin v. Williams*, 3 Har. & J. (Md.) 38, 5 Am. Dec. 417.

<sup>32</sup> *Coddington v. Goddard*, 16 Gray (Mass.) 436. But where, upon the making of a contract of sale and purchase, a broker acts merely to bring the parties together, after which they negotiate with each other directly, the broker has no power to bind them by memoranda signed by him. *Aguirre v. Allen*, 10 Barb. (N. Y.) 74. The actual signing of the memorandum, being merely a ministerial act, may be by the broker's clerk. *Williams v. Woods*, 16 Md. 220.

<sup>33</sup> *Coddington v. Goddard*, 16 Gray (Mass.) 436; *Clason's Ex'rs v. Bailey*, 14 Johns. (N. Y.) 484; *Merritt v. Clason*, 12 Johns. (N. Y.) 102, 7 Am. Dec. 286; *Sale v. Darragh*, 2 Hilt. (N. Y.) 184; *Williams v. Woods*, 16 Md. 220; *Bacon v. Eccles*, 43 Wis. 227; *Dinuba Farmers' Union Packing Co. v. J. M. Anderson Grocer Co.*, 193 Mo. App. 236, 182 S. W. 1036.

<sup>34</sup> *Coddington v. Goddard*, 16 Gray (Mass.) 436; *Merritt v. Clason*, 12 Johns. (N. Y.) 102, 7 Am. Dec. 286; *Clason's Ex'rs v. Bailey*, 14 Johns. (N. Y.) 484.

the terms of the bargain, and delivered by him to either party, is also sufficient.<sup>35</sup>

Where there is a material difference in the book entry and the bought and sold notes, puzzling questions have arisen.<sup>36</sup> It is submitted that their solution rests upon the following considerations: One who is authorized by two adverse parties to act for both is not in a full sense the agent of either; for a person cannot serve two masters having adverse interests. He is an independent contractor. Each party is bound by the intermediary's act because he consented to it, and only to that extent. The doctrine of respondeat superior has no application.<sup>37</sup> Where the intermediary is authorized to make a contract, he is an arbitrator,<sup>38</sup> the contract is an award and the rights of the parties are to be determined accordingly.<sup>39</sup>

Real estate brokers, however, have no power to sign memoranda which will bind both parties;<sup>40</sup> their power to sign an agreement which shall bind even the principal is denied in some cases,<sup>41</sup> though it is recognized in others.<sup>42</sup> He has no inherent authority to execute a contract but only to find a purchaser,<sup>43</sup> in the absence of a special understanding to the contrary.<sup>44</sup>

#### *Power to Delegate Authority*

A broker employed to make a contract for his principal must give the business his personal attention, because the principal is presumed to rely on his experience and discretion. The broker must not dele-

<sup>35</sup> *Butler v. Thomson*, 92 U. S. 412, 23 L. Ed. 684; *Bibb v. Allen*, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819; *Remick v. Sandford*, 118 Mass. 102; *Newberry v. Wall*, 84 N. Y. 576; *Weidmann v. Champion*, 12 Daly (N. Y.) 522; *Bacon v. Eccles*, 43 Wis. 227; *Whitman & Co. v. Namquit Worsted Co.* (D. C.) 206 Fed. 549.

<sup>36</sup> See *Mechem, Ag.* (2d Ed.) § 2373 et seq.

<sup>37</sup> See *Blackburn, Sales* (2d Ed.) p. 78; *Peltier v. Collins*, 3 Wend. (N. Y.) 459, 20 Am. Dec. 711; *Coddington v. Goddard*, 16 Gray (Mass.) 436.

<sup>38</sup> See quotation from *Bell v. McConnell*, on page 201, post.

<sup>39</sup> See *Arbitration and Award*, p. 353, post.

<sup>40</sup> *Morris v. Ruddy*, 20 N. J. Eq. 236.

<sup>41</sup> *Glentworth v. Luther*, 21 Barb. (N. Y.) 145; *Roach v. Coe*, 1 E. D. Smith (N. Y.) 175; *Hedden v. Shepherd*, 29 N. J. Law, 334; *Morris v. Ruddy*, 20 N. J. Eq. 236; *Keim v. O'Reilly*, 54 N. J. Eq. 418, 34 Atl. 1073; *Chapman v. Jewett* (Va.) 24 S. E. 261; *Halsey v. Monteiro*, 92 Va. 581, 24 S. E. 258.

<sup>42</sup> *Force v. Dutcher*, 18 N. J. Eq. 401; *Rutenberg v. Main*, 47 Cal. 213; *Pringle v. Spaulding*, 53 Barb. (N. Y.) 17; *Haydock v. Stow*, 40 N. Y. 363, overruling *Coleman v. Carrigues*, 18 Barb. (N. Y.) 60.

<sup>43</sup> *Johnson v. Dodge*, 17 Ill. 433, *Whitehouse v. Gerdis*, 95 Neb. 228, 145 N. W. 338; *Scully v. Brinton*, 55 N. J. Eq. 489, 37 Atl. 740; *Kramer v. Blair*, 88 Va. 456, 13 S. E. 914.

<sup>44</sup> *Rutenberg v. Main*, 47 Cal. 213; *Woods v. Wilson* (Iowa) 158 N. W. 495; *Williams v. Woods*, 16 Md. 220.

gate his authority.<sup>45</sup> But mere ministerial acts may be performed by a subagent or clerk, such as signing a memorandum of sale,<sup>46</sup> or selling stock on the market when the broker has decided upon the advisability of selling.<sup>47</sup> So, when a broker has a purchase or sale to make in a distant city, he may make it through an agent resident there.<sup>48</sup> When a broker has wrongfully delegated his authority, the principal, knowing of the delegation, cannot retain the benefits, and deny the power of the subagent.<sup>49</sup>

### *Power to Receive Payment*

A broker has ordinarily no implied power to receive payment for goods sold by him.<sup>50</sup> In a New York case evidence was refused of a local usage allowing brokers to receive payment for grain sold by them when the seller resided out of the city.<sup>51</sup> When, however, a broker is intrusted with the possession of the goods sold by him, he may receive payment; but this is because, by having possession, the broker becomes a factor, and clothed with the powers of a factor.<sup>52</sup> For this reason, stock brokers, who, as has been seen, are in reality factors, may receive payment for stock sold and delivered by them.<sup>53</sup> A real estate broker having power to "sell and convey" land has also an implied power to receive payment therefor. "An attorney who has power to convey has so essentially the power to receive the purchase money that a voluntary conveyance without receiving the stipulated price or security for it, would be fraudulent; and either the whole

<sup>45</sup> *Williams v. Woods*, 16 Md. 220; *Sims v. May*, 49 Hun, 607, 1 N. Y. Supp. 671; *Allen v. McConihe*, 124 N. Y. 342, 26 N. E. 812; *Elwell v. Chamberlain*, 2 Bosw. (N. Y.) 230; *Doggett v. Greene*, 254 Ill. 134, 98 N. E. 219, Ann. Cas. 1913B, 1166; *Grosscup v. Downey*, 105 Md. 273, 65 Atl. 930; *Kilpatrick v. Wiley*, 197 Mo. 123, 160, 95 S. W. 213.

<sup>46</sup> *Williams v. Woods*, 16 Md. 220.

<sup>47</sup> *Sims v. May*, 49 Hun, 607, 1 N. Y. Supp. 671; *Gregory v. Wendell*, 40 Mich. 432; *Gheen v. Johnson*, 90 Pa. 38.

<sup>48</sup> *Allen v. McConihe*, 124 N. Y. 342, 26 N. E. 812; *Rosenstock v. Tormey*, 32 Md. 169, 3 Am. Rep. 125.

<sup>49</sup> As where the subagent makes false representations. *Elwell v. Chamberlain*, 2 Bosw. (N. Y.) 230.

<sup>50</sup> *Higgins v. Moore*, 34 N. Y. 417; *Saladin v. Mitchell*, 45 Ill. 79; *Graham v. Duckwall*, 8 Bush (Ky.) 12; *Crosby v. Hill*, 39 Ohio St. 100. And see *Bassett v. Lederer*, 1 Hun (N. Y.) 274; *Gallup v. Lederer*, 1 Hun (N. Y.) 282; *Woods v. Wilson* (Iowa) 158 N. W. 495; *Latham v. J. E. Field & Son*, 160 N. C. 335, 76 S. E. 251. So as to loan broker, *Ortmeier v. Ivory*, 208 Ill. 577, 70 N. E. 665; *Robinson v. Citizens' Trust Co.*, 187 Mo. App. 51, 172 S. W. 1160.

<sup>51</sup> *Higgins v. Moore*, 34 N. Y. 417.

<sup>52</sup> See ante, p. 190, and *Factors*, p. 155.

<sup>53</sup> *Bid. Stock Brok.* 91; *Young v. Cole*, 4 Scott, 489; *Cropper v. Cook*, L. R. 3 C. P. 194; *Mollett v. Robinson*, L. R. 5 C. P. 646.

contract might be rescinded by the principal, or the vendee [be held] liable for the purchase money.”<sup>54</sup>

*Power to Rescind or Submit to Arbitration*

A broker has no implied power to settle disputes growing out of contracts made by him for his principal by submitting the differences to arbitration;<sup>55</sup> and, having made a contract, the broker has no implied power to rescind it.<sup>56</sup>

## RIGHTS AND LIABILITIES OF BROKERS

### 5. The rights and liabilities of brokers will be considered under the following heads:

- (a) Duty to observe good faith—Acting for both parties.
- (b) Liability for negligence.
- (c) Duty to follow instructions.
- (d) Duty to account.
- (e) Right to commissions.
- (f) Right to reimbursement and indemnity.
- (g) Right to a lien.
- (h) Rights against and liabilities to third persons.

### SAME—GOOD FAITH—ACTING FOR BOTH PARTIES

#### 6. A broker is required to observe perfect good faith in his dealing with his principal. He cannot act as agent for both parties, except—

**EXCEPTION**—By the weight of authority, a broker may act for both parties

- (a) When he introduces a named person or sells at a fixed price, or
- (b) When both parties consent.

A broker, being trusted with the confidence of his principal, is in a fiduciary relation to him, and is bound to exercise the utmost good faith.<sup>57</sup> He must not put himself in any position which makes his in-

<sup>54</sup> Peck v. Harriott, 6 Serg. & R. (Pa.) 146, 9 Am. Dec. 415.

<sup>55</sup> Ingraham v. Whitmore, 75 Ill. 24.

<sup>56</sup> Saladin v. Mitchell, 45 Ill. 79; Kelly v. Kauffman Milling Co., 92 Ga. 105, 18 S. E. 363. See, also, Stilwell v. Mutual Life Ins. Co. of New York, 72 N. Y. 385.

<sup>57</sup> Fottler v. Mosley, 185 Mass. 563, 70 N. E. 1040; Schick v. Suttle, 94 Minn. 135, 102 N. W. 217; Soule v. Deering, 87 Me. 365, 32 Atl. 998; Clark v. Bird, 66 App. Div. 284, 72 N. Y. Supp. 769; Henninger v. Heald, 52 N. J. Eq. 431, 29 Atl. 190.

terest adverse to that of his principal. He cannot act as agent for several principals whose interests are in conflict.<sup>58</sup> Nor can a broker instructed to buy or sell for his principal become the seller or purchaser,<sup>59</sup> unless it is with the knowledge and consent of the principal.<sup>60</sup> In such case it is no answer that his intention was honest, and that the broker did better for his principal by selling him his own property than he could have done by going into the open market. The rule is inflexible, and, although its violation in a particular case caused no damage to the principal, he cannot be compelled to adopt the purchase.<sup>61</sup>

### *Acting for Both Parties*

Good faith to his principal requires that a broker shall not attempt to act as agent for the other party also.<sup>62</sup> If a broker so acting makes a contract, the principals are not bound by it.<sup>63</sup> When an agent is thus employed by one party to sell, and by the other to purchase, and is vested with any discretion or judgment in the negotiation, his duties are in conflict, and he cannot fairly serve both parties. The duty of

<sup>58</sup> Murray v. Beard, 102 N. Y. 505, 7 N. E. 553.

<sup>59</sup> Bain v. Brown, 56 N. Y. 285; Tewksbury v. Spruance, 75 Ill. 187; Hughes v. Washington, 72 Ill. 84; Helberg v. Nichol, 149 Ill. 249, 37 N. E. 63; Stewart v. Mather, 32 Wis. 344; Sharman v. Brandt, L. R. 6 Q. B. 720; Mollett v. Robinson, L. R. 5 C. P. 655. A broker cannot sell to a firm of which he is a member. Francis v. Kerker, 85 Ill. 190. When a broker is authorized to sell at a certain price, and is to receive as compensation all above that price, it would seem that he might become the purchaser himself at the price fixed. But see Tower v. O'Neil, 66 Pa. 332.

<sup>60</sup> When a broker, authorized to sell, by a subsequent agreement with his principal becomes the purchaser himself, he is entitled to his commissions as though he had sold to a third person. Stewart v. Mather, 32 Wis. 344; Grant v. Hardy, 33 Wis. 668. This is true even if he has been guilty of a fraud on one who became a co-purchaser. Hardy v. Stonebraker, 31 Wis. 640.

<sup>61</sup> Taussig v. Hart, 58 N. Y. 425. A custom for a broker to buy of or sell to himself, unknown to the employer, is against public policy, and illegal. Farnsworth v. Hemmer, 1 Allen (Mass.) 494, 79 Am. Dec. 756; Com. v. Cooper, 130 Mass. 285; Texas Brokerage Co. v. John Barkley & Co., 60 Tex. Civ. App. 466, 128 S. W. 431.

<sup>62</sup> Robbins v. Sears (C. C.) 23 Fed. 874; Rice v. Wood, 113 Mass. 133, 18 Am. Rep. 459; Raisin v. Clark, 41 Md. 158, 20 Am. Rep. 66; Meyer v. Hanchett, 43 Wis. 246. And see Empire State Ins. Co. v. American Cent. Ins. Co., 138 N. Y. 446, 34 N. E. 200. A real-estate agent who sells the lands, for more than the price fixed by the terms of his contract, to another, for whom he is also agent for the investment of money, and secretly retains the excess, is liable to a double recovery therefor by the seller and purchaser. Lewis v. Denison, 2 App. D. C. 387. See, also, Quinn v. Burton, 195 Mass. 277, 81 N. E. 257; Siegel v. Rosenzweig, 129 App. Div. 547, 114 N. Y. Supp. 179.

<sup>63</sup> Taussig v. Hart, 58 N. Y. 425. For the right of a broker, acting for both parties, to commissions, see post, p. 207.

an agent for a vendor is to sell the property at the highest price; of the agent of the purchaser, to buy it for the lowest. These duties are so utterly irreconcilable and conflicting that they cannot be performed by the same person without great danger that the rights of one principal will be sacrificed to promote the interests of the other, or that neither of them will enjoy the benefit of a discreet and faithful exercise of the trust reposed in the agent.<sup>64</sup>

*Same—Exceptions—Middleman*

In some of the cases it is stated, as a broad exception to the rule that a broker cannot act for both parties, that he may do so when he is a mere middleman, and has no other duties to perform than to bring the parties together to contract for themselves.<sup>65</sup> But a broker does not act in good faith to his first employer if he turn aside all proposals that are not accompanied with an additional retainer or commission. Yet such is the temptation upon him if he may levy a fee from both parties. When he has secured the retainer of the other party, he is interested, in order to win his double commission, to bring together these two, to the exclusion of all others. The interests of his principal are in danger of prejudice from this counter interest in the agent. And, besides, the broker is ordinarily and almost inevitably intrusted, to a greater or less extent, with the confidence of his principal.<sup>66</sup>

The proper limits for the exception to the general rule seem to be that the broker may act for both parties when the one first employing him merely engages him to establish negotiations between the principal and a named person; and in such case there is no reason why the broker cannot lawfully receive a commission from the latter.<sup>67</sup> So, when a broker is employed to buy or sell at a fixed price, the broker to retain any difference, he may lawfully act as agent for the other party also.<sup>68</sup> But, if he conceals his agency from the

<sup>64</sup> Barry v. Schmidt, 57 Wis. 172, 15 N. W. 24, 46 Am. Rep. 35; Farnsworth v. Hemmer, 1 Allen (Mass.) 494, 79 Am. Dec. 756.

<sup>65</sup> Knauss v. Gottfried Krueger Brewing Co., 142 N. Y. 70, 36 N. E. 867; Siegel v. Gould, 7 Lans. (N. Y.) 177; Haviland v. Price, 6 Misc. Rep. 372, 26 N. Y. Supp. 757; Bonwell v. Auld, 9 Misc. Rep. 65, 29 N. Y. Supp. 15; Rupp v. Sampson, 16 Gray (Mass.) 398, 77 Am. Dec. 416; Orton v. Scofield, 61 Wis. 382, 21 N. W. 261; Herman v. Martineau, 1 Wis. 151, 60 Am. Dec. 368.

<sup>66</sup> Walker v. Osgood, 98 Mass. 348, 93 Am. Dec. 168; Scribner v. Collar, 40 Mich. 375, 29 Am. Rep. 541.

<sup>67</sup> See Knauss v. Gottfried Krueger Brewing Co., 142 N. Y. 70, 36 N. E. 867; Scribner v. Collar, 40 Mich. 375, 29 Am. Rep. 541.

<sup>68</sup> Barry v. Schmidt, 57 Wis. 172, 15 N. W. 24, 46 Am. Rep. 35; Montross v. Eddy, 94 Mich. 100, 53 N. W. 916, 34 Am. St. Rep. 323; Alexander v. Northwestern Christian University, 57 Ind. 466.



latter, the broker cannot lawfully act as his agent, because he has a personal interest in selling at as high, or buying at as low, a price as possible, and this interest is in conflict with that of the second principal.<sup>69</sup>

### *Same—Parties Consenting*

When both parties know of the double agency of a broker, and consent to it, he violates no duty to either principal, and his employment by each is legal.<sup>70</sup> Some cases, however, have declared such double agencies to be illegal, as against public policy.<sup>71</sup> The weight of authority and the better reason support the legality of such contracts. Thus, it was said in an Ohio case:<sup>72</sup> "We admit that all such transactions should be regarded with suspicion; but, where full knowledge and consent of all parties interested are clearly shown, we know of no public policy or principle of sound morality which can be said to be violated. It seems to us, rather, that public policy requires that contracts fairly entered into by parties competent to contract should be enforced where no public law has been violated, and no corrupt purpose or end is sought to be accomplished. True, such agent may not be able to serve each of his principals with all his skill and energy. He may not be able to obtain for his vendor principal the highest price which could be obtained, or for the purchaser the lowest price for which it could be purchased. But he can render to each a service entirely free from falsehood and fraud—a fair and valuable service, in which his best judgment and his soundest discretion are fully and freely exercised. And in such case such service is all that either of his principals contracted for. Undoubtedly, if two persons desire to negotiate an exchange or a bargain and sale of property,

<sup>69</sup> *Everhart v. Searle*, 71 Pa. 256; *Foss v. New York Cent. & H. R. R. Co.*, 161 App. Div. 681, 146 N. Y. Supp. 930.

The contract between the broker and his second employer is void, where the second employer only has knowledge of the double employment. See *Sullivan v. Tufts*, 203 Mass. 155, 89 N. E. 239; *Rice v. Davis*, 136 Pa. 439, 20 Atl. 513, 20 Am. St. Rep. 931; *Summa v. Dereskiawicz*, 82 Conn. 547, 74 Atl. 906; *Sternberger v. Young*, 73 N. J. Eq. 586, 75 Atl. 807.

<sup>70</sup> *Rowe v. Stevens*, 53 N. Y. 621; *Alexander v. Northwestern Christian University*, 57 Ind. 466; *Joslin v. Cowee*, 56 N. Y. 626; *Adams Min. Co. v. Senter*, 26 Mich. 73; *Fitzsimmons v. Southern Express Co.*, 40 Ga. 330, 2 Am. Rep. 577; *United States Rolling Stock Co. v. Atlantic & G. W. R. Co.*, 34 Ohio St. 450, 32 Am. Rep. 380; *Pugsley v. Murray*, 4 E. D. Smith (N. Y.) 245. See, also, note by Bennett to *Lynch v. Fallon*, 16 Am. Law Reg. 333; *Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 528; *Manders v. Craft*, 3 Colo. App. 236, 32 Pac. 836.

<sup>71</sup> *Raisin v. Clark*, 41 Md. 158, 20 Am. Rep. 66; *Meyer v. Hanchett*, 43 Wis. 246.

<sup>72</sup> *Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 528.

they may agree to delegate to a third person the power to fix the terms, and no suspicion of a violated public policy would arise. It may be said that such third person is an arbitrator chosen to settle differences between his employers—an agency or office greatly favored in the law. And so it is. But what is the distinction between that employment and the one in the present case, which should cause the law to favor the former and abhor the latter?"<sup>73</sup>

### SAME—NEGLIGENCE

#### 7. A broker is bound to possess and exercise reasonable skill and diligence. He is liable to his principal for losses due to his negligence.

A broker holds himself out as possessed of ordinary skill in the business in which he is engaged; and, when he undertakes a negotiation, he is bound to conduct it with reasonable diligence.<sup>74</sup> If he does this, he is not liable to his principal for negligence.<sup>75</sup> A money broker, to whom money is intrusted to loan, is liable if, by his want of care in estimating the value of the land on which a mortgage is taken as security, his principal suffers a loss.<sup>76</sup> So if he fails to record the mortgage, when that is part of his duty.<sup>77</sup> A broker who, without sufficient information, advises his principal to make a sale, will be held responsible if the sale causes a loss.<sup>78</sup> But an insurance broker who takes out policies for his principal in companies reputed solvent at that time is not liable if they subsequently fail.<sup>79</sup> And a stock broker has been held not to be liable for margins lost which he had deposited

<sup>73</sup> *Bell v. McConnell*, 37 Ohio St. 396, 401, 41 Am. Rep. 528. See p. 196, ante.

<sup>74</sup> *Shipherd v. Field*, 70 Ill. 438; *McFarland v. McClees* (Pa.) 5 Atl. 50; *Barnard v. Coffin*, 138 Mass. 37; *Stewart v. Muse*, 62 Ind. 385; *Hopkins v. Clark*, 7 App. Div. 207, 40 N. Y. Supp. 130, affirmed 158 N. Y. 299, 53 N. E. 27.

<sup>75</sup> *Gheen v. Johnson*, 90 Pa. 38; *Gettins v. Scudder*, 71 Ill. 86; *Matthews v. Fuller*, 123 Mass. 446. When property is placed with a broker for sale, he is not bound to consummate a sale, or procure a purchaser upon the agreed terms. *Walsh v. Hastings*, 20 Colo. 243, 38 Pac. 324.

<sup>76</sup> *McFarland v. McClees* (Pa.) 5 Atl. 50; *Shipherd v. Field*, 70 Ill. 438. Where defendant, a stock broker, took certificates of stock as collateral security for a loan he was authorized to make for a client, without inquiring as to their validity at the office of the corporation, which was accessible to him, or taking other precautions, and the certificates proved to be forgeries, defendant was guilty of such negligence as to render him liable for the loss. *Isham v. Post*, 71 Hun, 184, 23 N. Y. Supp. 211, 1168; *Post v. Isham*, Id.

<sup>77</sup> *Stewart v. Muse*, 62 Ind. 385.

<sup>78</sup> *Barnard v. Coffin*, 138 Mass. 37.

<sup>79</sup> *Gettins v. Scudder*, 71 Ill. 86.

with another broker, according to the usage of the "Board of Brokers," and had not required security therefor.<sup>80</sup> A broker exercising reasonable care in making investments is not liable for a subsequent depreciation in the stocks bought.<sup>81</sup>

### SAME—FOLLOWING INSTRUCTIONS

**8. A broker is bound to follow the instructions given him by his principal, and is liable for all losses resulting from his failure to do so.**

A broker must conform to the instructions given him by his principal.<sup>82</sup> If he exceeds his instructions, contracts made by him for the principal do not bind the latter.<sup>83</sup> By failing to follow instructions, the broker becomes liable to the principal for any losses resulting from the breach of duty.<sup>84</sup> Under an order to buy stock "on 60 days' buy-

<sup>80</sup> *Gheen v. Johnson*, 90 Pa. 38.

<sup>81</sup> *Matthews v. Fuller*, 123 Mass. 446.

<sup>82</sup> *Pickering v. Demerritt*, 100 Mass. 416; *White v. Smith*, 54 N. Y. 522. Authority to a real estate agent to contract for a sale will not authorize him to make a contract for the sale of an option to purchase. *Jones v. Holladay*, 2 App. D. C. 279. After preliminary correspondence, a real estate broker wrote to defendant, stating that he could sell defendant's land (800 acres) for \$4,000, one-half cash, balance in one and two years at 8 per cent. interest. Defendant telegraphed, "Accept the \$4,000 proposition." Held not to authorize the broker to contract to sell for cash. *Everman v. Herndon*, 71 Miss. 823, 15 South. 135. A usage of brokers will not justify a breach of instructions. *Parsons v. Martin*, 11 Gray (Mass.) 111; *Day v. Holmes*, 103 Mass. 306.

<sup>83</sup> *Morris v. Ruddy*, 20 N. J. Eq. 236. A sale on terms more advantageous than those ordered by the principal will not bind him, unless he ratifies the sale. *Nesbitt v. Helser*, 49 Mo. 383.

It would seem that a mere deviation from the price fixed would bind the principal, as purporting to be within the agent's authority (see *Principal and Agent*, p. 59, ante), though there are many dicta to the contrary. See *Lucas v. Rader*, 29 Ind. App. 287, 64 N. E. 488; *Nester v. Craig*, 69 Hun, 543, 23 N. Y. Supp. 948. In all the above cases there was a material deviation, not merely in price.

<sup>84</sup> *Laverty v. Snethen*, 68 N. Y. 522, 23 Am. Rep. 184; *Gray v. Murray*, 3 Johns. Ch. (N. Y.) 167; *Schmertz v. Dwyer*, 53 Pa. 335. Where grain brokers employed by a dealer to buy and sell wheat for future delivery write the dealer that a contract which he has for May can be changed to June delivery, to which letter the dealer makes no reply, though he is in a position to do so, and the brokers then change the contract, the fact that the dealer receives and retains a statement sent him by the broker, showing such change, does not show a ratification of the broker's act in making the change. *Hansen v. Boyd*, 161 U. S. 397, 16 Sup. Ct. 571, 40 L. Ed. 746; *Lunn v. Guthrie*, 115 Iowa, 501, 88 N. W. 1060.

er's option," a broker cannot buy the stock himself, and hold it on his principal's account for 60 days.<sup>85</sup> By disobeying instructions, a broker may lose his lien on money or property in his hands.<sup>86</sup>

### SAME—DUTY TO ACCOUNT

9. A broker is bound to render his principal an account of all business transacted on his behalf, and pay over any balance due the principal.

The duty of a broker in keeping and rendering accounts to his principal is practically the same as that of a factor.<sup>87</sup> He must keep accurate record of all his transactions, and render statements thereof on the demand of the principal. The broker must pay over to the principal any balance remaining due him.<sup>88</sup>

### SAME—RIGHT TO COMMISSIONS

10. A broker is entitled to commissions for the service he performs.

This right will be considered under the following heads:

- (a) Employment necessary.
- (b) Amount of commission.
- (c) Acting for both parties.
- (d) Illegal contracts.
- (e) What is performance by broker.
- (f) Performance within time given.
- (g) Sale completed by principal—Broker procuring cause.
- (h) Sale prevented by principal.
- (i) Exclusive agency—More than one broker employed.
- (j) Effect of requiring a license.

#### *Employment Necessary*

A broker is entitled to compensation in some form for the services performed for his principal. But, before a broker can recover any form of compensation, he must show employment; that is, he must

<sup>85</sup> *Pickering v. Demeritt*, 100 Mass. 416. And see *Day v. Holmes*, 103 Mass. 306.

<sup>86</sup> *Jones v. Marks*, 40 Ill. 313.

<sup>87</sup> See *Factors*, p. 167; *Prout v. Chisolm*, 89 Hun, 108, 34 N. Y. Supp. 1066. *Des Jardins v. Hotchkiss*, 142 App. Div. 845, 127 N. Y. Supp. 504.

<sup>88</sup> *Haas v. Damon*, 9 Iowa, 589; *Nourse v. Prime*, 7 Johns. Ch. (N. Y.) 69, 11 Am. Dec. 403.

establish the existence of the relation of principal and broker.<sup>89</sup> Performing services as a mere volunteer, from which the principal derives a benefit, does not entitle the broker to compensation; as, where a broker, without a previous employment, sends to the owner of property a person to whom he sells it, the broker acquires no right to a commis-

<sup>89</sup> *Campbell Printing Press & Mfg. Co. v. Yorkston*, 11 Misc. Rep. 340, 32 N. Y. Supp. 263; *De Mars v. Boehm*, 6 Misc. Rep. 38, 26 N. Y. Supp. 67; *Cook v. Welch*, 9 Allen (Mass.) 350; *Cummings v. Town of Lake Realty Co.*, 86 Wis. 382, 57 N. W. 43; *Hinds v. Henry*, 36 N. J. Law, 328; *Atwater v. Lockwood*, 39 Conn. 45; *Meston v. Davies* (Tex. Civ. App.) 36 S. W. 805; *Walton v. Clark*, 54 Minn. 341, 56 N. W. 40. But see, for facts held to show employment, *Holden v. Starks*, 159 Mass. 503, 34 N. E. 1069, 38 Am. St. Rep. 451; *Bassett v. Rogers*, 162 Mass. 47, 37 N. E. 772. The one contracting to pay the commission need not be the beneficial owner of the property to be sold. *Jones v. Adler*, 34 Md. 440. And see *Landsberger v. Murray*, 6 Misc. Rep. 605, 25 N. Y. Supp. 1007; *Bowles v. Allen* (Va.) 21 S. E. 665. To recover commissions from a corporation, a broker must prove employment by some one having power to bind the corporation. *Twelfth St. Market Co. v. Jackson*, 102 Pa. 269. A wife has no power to bind her husband to pay a broker commissions. *Harper v. Goodall*, 62 How. Prac. (N. Y.) 288. Where a broker employed to sell defendant's farm on commission produces a purchaser, who takes the property at a price fixed by defendant, the latter cannot withhold the commission on the ground that when the contract of employment was made the broker had, unknown to defendant, already found the customer, and was employed by him to buy a farm, but from whom he was to receive no commission. *Donohue v. Padden*, 93 Wis. 20, 66 N. W. 804. Where a broker asks and obtains from the owner of land the price at which he is willing to sell it, this, of itself, does not establish the relation of principal and agent between the owner and the broker. *Castner v. Richardson*, 18 Colo. 496, 33 Pac. 163. Mere consent by a person to the rendering by a real-estate agent of the unsolicited services, which enable him to sell his land, does not entitle the agent to recover compensation therefor under an implied promise of remuneration. *Viley v. Pettit*, 96 Ky. 576, 29 S. W. 438. Defendant, in a conversation with plaintiff, whom he knew to be a real estate broker, but whose services in selling the property in question he had previously declined, told plaintiff that he would take \$30,000 for the property. Plaintiff asked him if he was in earnest, and defendant said that he meant business, and that, if plaintiff did not think so, let him bring a purchaser. Held, that the language did not constitute an offer to pay plaintiff a commission for procuring a purchaser at the price stated. *Dunn v. Price*, 87 Tex. 318, 28 S. W. 681. A real estate broker employed to sell land, who agrees to pay another broker a commission if he procures a purchaser therefor, is liable for the commission if the purchaser is procured, though he afterwards discovers that the land is not the property of his principal. *Barthell v. Peter*, 88 Wis. 316, 60 N. W. 429, 43 Am. St. Rep. 906. Where a broker employed to sell whisky introduced a purchaser, to whom the principal gave an option on goods made and to be made the next year, the broker was held not entitled to commissions on whisky sold under the option, but of the next season's manufacture. *Block v. Walker*, 19 C. C. A. 65, 72 Fed. 650. See, also, *Woods v. Lowe*, 207 Mass. 1, 92 N. E. 772; *Denton v. Abrams*, 120 App. Div. 593, 105 N. Y. Supp. 2.

sion from the vendor.<sup>90</sup> In some cases it is said, however, that a broker is entitled to commissions if the principal adopts and ratifies his acts.<sup>91</sup>

### *Amount of Commission*

A broker's compensation is nearly always paid in the form of a commission.<sup>92</sup> This is usually a percentage on the amount involved in the transaction in which the broker is employed;<sup>93</sup> but it may be a definite sum, independent of the price received by the vendor, or the broker for the sale of property may be given all he receives over a fixed price.<sup>94</sup> The amount of a broker's commission is determined

<sup>90</sup> Cook v. Welch, 9 Allen (Mass.) 350; Castner v. Richardson, 18 Colo. 496, 33 Pac. 163; Atwater v. Lockwood, 39 Conn. 45. And see Ellis v. Dunsworth, 49 Ill. App. 187; Samuels v. Luckenbach, 205 Pa. 428, 54 Atl. 1091; Summa v. Dereskiawicz, 82 Conn. 547, 74 Atl. 906; McVickar v. Roche, 74 App. Div. 397, 77 N. Y. Supp. 501.

<sup>91</sup> Low v. Railroad Co., 46 N. H. 284; Twelfth St. Market Co. v. Jackson, 102 Pa. 269; Keys v. Johnson, 68 Pa. 42. Cf. Maze v. Gordon, 96 Cal. 61, 30 Pac. 962. A departure of a real estate agent from the terms of his authority in effecting a sale becomes, on ratification by the principal, a part of the original contract of employment, and the compensation fixed therein controls. Gelatt v. Ridge, 117 Mo. 553, 23 S. W. 882, 38 Am. St. Rep. 683. The fact that in the sale of land the vendor and vendee agree that the latter shall pay the commissions agreed upon between the vendor and plaintiff for the services of the latter in negotiating the sale does not relieve the vendor of liability to plaintiff, in the absence of an agreement on plaintiff's part to release the vendor. Burnett v. Casteel (Tex. Civ. App.) 36 S. W. 782.

That a subsequent promise to pay compensation is without consideration. Sharp v. Hoopes, 74 N. J. Law, 191, 64 Atl. 989.

What is called ratification is really a modification of the original employment, see Wilson v. Burch (Tex. Civ. App.) 162 S. W. 1018; Carlson v. Marshall, 174 Ill. App. 438; Culbertson v. Sheridan, 93 Kan. 268, 144 Pac. 268.

<sup>92</sup> Whether one who is paid a salary can be a broker, see ante, p. 190.

<sup>93</sup> An agent for the sale of land, who makes a sale payable in installments, is entitled to commission on the installments as paid, and not to his entire commission out of the first installment paid. Melvin v. Aldridge, 81 Md. 650, 32 Atl. 389. Gresham v. Galveston County (Tex. Civ. App.) 36 S. W. 796. Where a broker who sold certain property for a receiver was entitled to have only a proportionate part of his commission out of the sum paid down, and was to participate at the same rate in the deferred payments, but the purchaser made default in the deferred payments, and the property was sold under a trust deed securing the unpaid purchase price, and was bid in by another for a nominal sum, but the purchaser, pursuant to a guaranty he had made to the receiver, paid a much larger sum, the broker is entitled to his commission on said larger sum. Peters v. Anderson (Va.) 23 S. E. 754.

<sup>94</sup> See Wilson v. Burch (Tex. Civ. App.) 162 S. W. 1018.

A real estate agent employed to sell land for a certain price is not entitled to any excess, over such price, he may obtain for the land. Snow v. Macfarlane, 51 Ill. App. 448. And see Humphreys v. Hoge (Va.) 25 S. E. 106.

by the express contract of the parties, by usage, or, in the absence of either contract or usage, by the reasonable value of the services performed.<sup>95</sup> A usage, however, to fix the rate of compensation, must be established, known, and definite.<sup>96</sup>

Where a broker is employed upon commission, he cannot ordinarily recover for part performance or upon a quantum meruit for work done less than full performance.<sup>97</sup>

### *Acting for Both Parties*

It has already been seen that in most cases a broker cannot act as agent for both parties. The exceptions to that general rule have also been stated.<sup>98</sup> When the circumstances are such that the double employment is legal, the broker may recover commissions from both parties;<sup>99</sup> otherwise, he may lose his right to a commission from

<sup>95</sup> Carruthers v. Towne, 86 Iowa, 318, 53 N. W. 240.

<sup>96</sup> Potts v. Aechternacht, 93 Pa. 138; Deshler v. Beers, 32 Ill. 368, 83 Am. Dec. 274; Morgan v. Mason, 4 E. D. Smith (N. Y.) 636; Erben v. Lorillard, \*41 N. Y. 567; Thomas v. Brandt (Md.) 26 Atl. 524. In an action on a quantum meruit to recover compensation for effect a sale of real estate, plaintiff not being a regular real estate agent, proof of the customary charges of such agents for similar services is not conclusive. Kennerly v. Sommerville, 2 Mo. App. 918.

<sup>97</sup> Cadigan v. Crabtree, 179 Mass. 484, 61 N. E. 37, 55 L. R. A. 77, 88 Am. St. Rep. 397; Gilbert v. McCullough, 146 Iowa, 333, 125 N. W. 173.

<sup>98</sup> Ante, p. 198. An agreement by real estate agents to divide their commissions with the purchaser of land, made without the knowledge of their principal, does not affect their right to recover the commissions which such principal agreed to pay. Scott v. Lloyd, 19 Colo. 401, 35 Pac. 733. The mere fact that an agent employed to find a purchaser for land advanced to the purchaser money to make a part payment does not prevent a recovery of his commission from the vendor. Lawson v. Thompson, 10 Utah, 462, 37 Pac. 732. Where a broker's contract to procure a purchaser at a specified price simply requires him to bring his principal and the purchaser together, so that they themselves can make their own contract, he may recover commissions from both parties on separate contracts with each. Childs v. Ptomey, 17 Mont. 502, 43 Pac. 714. A real estate agent, employed to buy certain property at a certain price, does not forfeit the commission which the purchaser agreed to pay him because he secured another commission from the vendor after the vendor had accepted the terms offered. Jones v. Henry, 15 Misc. Rep. 151, 36 N. Y. Supp. 483. Where a broker is employed to sell at a specified price, he does not, by accepting a commission from the purchaser, lose his right to commissions from the vendor. Alexander v. Northwestern Christian University, 57 Ind. 466; Barry v. Schmidt, 57 Wis. 172, 15 N. W. 24, 46 Am. Rep. 35. It has been held in some cases that knowledge and consent of both parties to a broker's double agency would not entitle him to commissions from both. Raisin v. Clark, 41 Md. 158, 20 Am. Rep. 66; Lynch v. Fallon, 11 R. I. 311, 23 Am. Rep. 458. See p. 201, ante.

<sup>99</sup> Finch v. Comrade's Ex'r, 154 Pa. 326, 26 Atl. 368; Bell v. McConnell, 37 Ohio St. 396, 41 Am. Rep. 528; McDonald v. Maltz, 94 Mich. 172, 53 N. W. 1058, 34 Am. St. Rep. 331; Herman v. Martineau, 1 Wis. 151, 60 Am. Dec.

either.<sup>1</sup> When a broker has been employed to perform certain duties under promise of a commission, and he attempts to act as agent for the other party also, for an additional commission, by engaging with the second he forfeits his right to compensation from the one who first employed him.<sup>2</sup> By the second engagement, the agent, if he does not in fact disable himself from rendering to the first employer the full quantum of service contracted for, at least tempts himself not to do so. And, for the same reason, he cannot recover from the second employer, who is ignorant of the first engagement.<sup>3</sup> And, if the second employer has knowledge of the first engagement, then both he and the agent are guilty of the wrong committed against the first employer, and the law will not enforce an executory contract entered into in fraud of the rights of the first employer. It is no answer to say that the second employer, having knowledge of the first employment, should be held liable on his promise, because he could not be defrauded in the transaction. The contract itself is void as against public policy and good morals, and, both parties thereto being in *pari delicto*, the law will leave them as it finds them.<sup>4</sup>

### *Illegal Contracts*

It has already been seen that certain classes of contracts, entered into through the agency of brokers, are illegal.<sup>5</sup> The question is

368; *Rowe v. Stevens*, 53 N. Y. 621; *Siegel v. Gould*, 7 Lans. (N. Y.) 177; *Lansing v. Bliss*, 86 Hun. 205, 33 N. Y. Supp. 310; *Smith v. Tripis*, 2 Tex. Civ. App. 267, 21 S. W. 722; *Sherwin v. O'Connor*, 24 Neb. 603, 39 N. W. 620; *Campbell v. Baxter*, 41 Neb. 729, 60 N. W. 90.

<sup>1</sup> *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459; *Young v. Trainor*, 158 Ill. 428, 42 N. E. 139; *Fuller Watchman's Electrical Detector Co. v. Louis*, 50 Ill. App. 428; *Perkins v. Brainerd Quarry Co.*, 11 Misc. Rep. 328, 32 N. Y. Supp. 230; *Strawbridge v. Swan*, 43 Neb. 781, 62 N. W. 199. Real estate agents representing the different owners in an exchange of lands lose the right to commissions by their entering into an agreement, without the consent of their principals, to pool or divide their commissions. *Norman v. Roseman*, 59 Mo. App. 682.

<sup>2</sup> *Walker v. Osgood*, 98 Mass. 348, 93 Am. Dec. 168; *Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 528; *Tinsley v. Penniman*, 12 Tex. Civ. App. 591, 34 S. W. 365. And see p. 198, ante.

<sup>3</sup> *Meyer v. Hanchett*, 39 Wis. 419; *Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 528. A usage of brokers to charge a commission to both parties to an exchange of property will not be enforced. *Raisin v. Clark*, 41 Md. 158, 20 Am. Rep. 66; *Farnsworth v. Hemmer*, 1 Allen (Mass.) 494, 79 Am. Dec. 756. But see *Mullen v. Keetzieb*, 7 Bush (Ky.) 253. See p. 199, ante.

<sup>4</sup> *Farnsworth v. Hemmer*, 1 Allen (Mass.) 494, 79 Am. Dec. 756; *Walker v. Osgood*, 98 Mass. 348, 93 Am. Dec. 168; *Smith v. Townsend*, 109 Mass. 500; *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459; *Bollman v. Loomis*, 41 Conn. 581; *Everhart v. Searle*, 71 Pa. 256; *Morison v. Thompson*, L. R. 9 Q. B. 480; *Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 528; *Lynch v. Fallon*, 11 R. I. 311, 23 Am. Rep. 458. See p. 198, ante.

<sup>5</sup> Ante, p. 192.



now as to the effect of such illegality on the broker's right to compensation. A broker might negotiate such a contract without being privy to the illegal intent of the principal parties to it, which renders it void, and in such a case, being innocent of any violation of law, and not suing to enforce an unlawful contract, has a meritorious ground for the recovery of compensation for services and advances.<sup>6</sup> But when the broker is privy to the unlawful design of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is *particeps criminis*, and cannot recover for services rendered or losses incurred by himself on behalf of either in forwarding the transaction.<sup>7</sup>

### *What is Performance by Broker*

What constitutes performance by a broker, so that he is entitled to his commissions, is a question depending on the facts of each case, and the construction of the contract between the broker and his principal. The usages of trade in many cases determine when a broker has earned his commissions under the indefinite contracts so often entered into in commercial transactions. A broker's compensation is usually made to depend on his success in carrying through the negotiation which he undertakes.<sup>8</sup> A broker is not entitled to compensation when, from his negligence or willful misconduct, the benefit of the

<sup>6</sup> *Irwin v. Williar*, 110 U. S. 499, 4 Sup. Ct. 160, 28 L. Ed. 225; *Crawford v. Spencer*, 92 Mo. 498, 4 S. W. 713, 1 Am. St. Rep. 745; *Bartlett v. Smith* (C. C.) 13 Fed. 263; *Kirkpatrick v. Adams* (C. C.) 20 Fed. 287; *First Nat. Bank v. Oskaloosa Packing Co.*, 66 Iowa, 41, 23 N. W. 255. The fact that an agreement for the sale of land to a purchaser procured by plaintiff was made on Sunday does not affect plaintiff's right of action on a prior agreement to pay him for securing a purchaser. *Boland v. Kistle*, 92 Iowa, 369, 60 N. W. 632. An agent employed to procure a purchaser for real estate cannot recover a commission for effecting a sale to a person who has agreed to buy as the agent's silent partner. *Reardon v. Washburn*, 59 Ill. App. 161.

<sup>7</sup> *Irwin v. Williar*, 110 U. S. 499, 4 Sup. Ct. 160, 28 L. Ed. 225; *Crawford v. Spencer*, 92 Mo. 498, 4 S. W. 713, 1 Am. St. Rep. 745; *Cobb v. Prell* (C. C.) 15 Fed. 774; *Bangs v. Hornick* (C. C.) 30 Fed. 97.

<sup>8</sup> *Ayres v. Thomas*, 116 Cal. 140, 47 Pac. 1013; *Leschziner v. Bauman*, 83 N. J. Law, 743, 85 Atl. 205; *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 382, 38 Am. Rep. 441; *Henschell v. J. L. Gates Land Co.*, 146 Wis. 140, 131 N. W. 423.

Where the broker's contract with his principal is that he shall receive all obtained from the purchaser above a fixed price, the broker is entitled to no compensation when a sale is made at or below that price. *Rees v. Spruance*, 45 Ill. 308; *Beatty v. Russell*, 41 Neb. 321, 59 N. W. 919. But where there was a contract to pay the broker a commission if he effected a sale at \$16,000 if the owner subsequently sells to a purchaser produced by the broker at \$14,000, the broker is entitled to a proportional commission, without an express agreement to pay. *Jones v. Adler*, 34 Md. 440; *Byrd v. Frost* (Tex. Civ. App.) 29 S. W. 46.

transaction is lost to his principal;<sup>9</sup> nor when he violates his duty to exercise good faith.<sup>10</sup> A broker who becomes the purchaser of property placed in his hands for sale has no right to commissions.<sup>11</sup> The broker may also, by special agreement with his principal, so contract as to make his compensation dependent on a contingency which his efforts cannot control, even though it relate to the acts of his principal.<sup>12</sup>

The nature of the services required of a broker is determined by the business in which he is engaged. Thus, a broker who is employed to procure a loan is entitled to his commission when he procures a lender

<sup>9</sup> *Fisher v. Dynes*, 62 Ind. 348; *Hamond v. Holiday*, 1 Car. & P. 384; *Hurst v. Holding*, 3 Taunt. 32.

<sup>10</sup> A real estate agent is not entitled to commissions from the vendee, as agreed on between them, where the agent asks the vendee a price greatly in excess of that fixed on the land by the vendor, and conceals from the vendee the fact that the vendor had instructed him to sell to the former at the reduced price. *Phinney v. Hall*, 101 Mich. 451, 59 N. W. 814. Where brokers, who are authorized to sell for a certain price, by colorable sales to an employé, and actual sales of part of the premises, sell for a much larger price without their principal's knowledge, the brokers cannot retain the commission charged on the colorable sale to the employé, nor charge commissions on the actual sales made. *Powers v. Black*, 159 Pa. 153, 28 Atl. 133. The fact that the broker reported to his principal that an offer of \$16,000 for the land had been made, instead of \$15,000, does not affect his right to a commission, where, as a result of his negotiation, a sale for the smaller sum was made. *Peckham v. Ashhurst*, 18 R. I. 376, 28 Atl. 337. The fact that the purchaser procured by the agent was acting in behalf of another does not affect the agent's right to commissions. *Gelatt v. Ridge*, 117 Mo. 553, 23 S. W. 882, 38 Am. St. Rep. 683.

<sup>11</sup> The fact that, unknown to the principal, a member of a firm employed to sell land belongs to the syndicate to which the land is sold, bars the firm from recovering a commission for the sale, though the price received by the principal was fair, and all that he demanded. *Hammond v. Bookwalter*, 12 Ind. App. 177, 39 N. E. 872. When an agent employed to sell real estate becomes the purchaser, though it be with the consent of the principal, he cannot recover a commission for the sale, in the absence of a special agreement therefor made at or after the time he presented himself as purchaser. *Hammond v. Bookwalter*, 12 Ind. App. 177, 39 N. E. 872.

<sup>12</sup> *Bull v. Price*, 7 Bing. 237; *Alder v. Boyle*, 4 C. B. 635; *Tombs v. Alexander*, 101 Mass. 255, 3 Am. Rep. 349; *Walker v. Tirrell*, 101 Mass. 257, 3 Am. Rep. 352; *Hinds v. Henry*, 36 N. J. Law, 328. Where an owner of mines contracts with a broker to pay him a commission "if he effects a sale or deal of the mines" with a person introduced by the broker, and the agreement made with such person is made conditional on his approval of the organization of a corporation, and fails for want of such approval, the broker is not entitled to his commission. *Hammond v. Crawford*, 14 C. C. A. 109, 66 Fed. 425. Under an agreement to pay commissions for negotiating a "satisfactory lease," the lessor cannot arbitrarily refuse to accept a lease negotiated. *Mullally v. Greenwood*, 127 Mo. 138, 29 S. W. 1001, 48 Am. St. Rep. 613.

ready, willing, and able to lend the money upon the terms proposed. His right to commission does not depend upon the contingency of the applicant's acceptance of the loan, but upon his performance of his part of the contract. The principal cannot deprive the broker of his commission by refusing to accept the loan which the negotiations of the latter have resulted in securing.<sup>13</sup> So, a loan broker is entitled to his commissions, although the lender finally refuses to make the proposed loan because the borrower's title is found to be defective.<sup>14</sup>

So, a broker to effect a sale of property earns his commissions by producing a purchaser who is ready, willing, and able to purchase at the price fixed by the principal.<sup>15</sup> A written contract, binding on the

<sup>13</sup> *Vinton v. Baldwin*, 88 Ind. 104, 45 Am. Rep. 447. Cf. *Corning v. Calvert*, 2 Hilton (N. Y.) 56; *Smith v. Peyrot*, 201 N. Y. 210, 94 N. E. 662.

<sup>14</sup> *Holly v. Gosling*, 3 E. D. Smith (N. Y.) 262. Contra, *Budd v. Zoller*, 52 Mo. 238 (but see dissenting opinion). Statutes in some states limit the commissions which a broker may charge for procuring a loan. *Broad v. Hoffman*, 6 Barb. (N. Y.) 177; *Revision N. J. p. 519*, § 5; 4 Comp. St. N. J. 1910, p. 5706, § 5. See, also, *Clark v. Henry G. Thompson & Son Co.*, 75 Conn. 161, 52 Atl. 720; *Wright v. Young*, 176 Mass. 100, 57 N. E. 212; *Middleton v. Thompson*, 163 Pa. 112, 29 Atl. 796.

<sup>15</sup> *Moses v. Bierling*, 31 N. Y. 462; *Wylie v. Marine Nat. Bank of City of New York*, 61 N. Y. 415; *Gerding v. Haskin*, 141 N. Y. 514, 36 N. E. 601; *Barnard v. Monnot*, \*42 N. Y. 203; *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 441; *Menifee v. Higgins*, 57 Ill. 50; *Lang v. Hand*, 57 Ill. App. 134; *Bash v. Hill*, 62 Ill. 216; *Williams v. McGraw*, 52 Mich. 480, 18 N. W. 227; *Stewart v. Mather*, 32 Wis. 344; *Bradford v. Menard*, 35 Minn. 197, 28 N. W. 248; *Hamlin v. Schulte*, 31 Minn. 486, 18 N. W. 415; *McGavock v. Woodlief*, 20 How. 221, 15 L. Ed. 884; *Mattingly v. Pennie*, 105 Cal. 514, 39 Pac. 200, 45 Am. Rep. 87; *Brown v. Wilson*, 98 Iowa, 316, 67 N. W. 251; *Jones v. Holladay*, 2 App. D. C. 279. Refusal of the principal to complete the sale does not relieve him of his liability to the broker. *Kock v. Emmerling*, 22 How. 69, 16 L. Ed. 292; *Glentworth v. Luther*, 21 Barb. (N. Y.) 145; *Van Lien v. Byrnes*, 1 Hilt. (N. Y.) 134. It has been held that a broker was not entitled to commissions when the purchaser produced by him refused to accept a quitclaim deed, and demanded a warranty deed. *Garcelon v. Tibbetts*, 84 Me. 148, 24 Atl. 797. Authority to sell land at \$16 per acre, for one-third cash, and balance in 1, 2, and 3 years, or for \$10,000 cash, is not complied with by a sale by the terms of which the vendee pays \$5 cash, and balance of one-third the price in 60 days, and balance of the price in 36 months. *Halsey v. Monteiro*, 92 Va. 581, 24 S. E. 258. A contract by defendant to pay plaintiff a specified commission after six months from the delivery to defendant of a deed for a one-half interest in a ranch owned by a third person is indivisible, and plaintiff cannot, upon defendant's purchase of a one-third interest in such ranch, recover a proportionate commission. *Witte v. Taylor*, 110 Cal. 224, 42 Pac. 807. A contract giving the proposed purchaser an option to purchase at the price and terms proposed is not such a contract of sale as entitles the broker to commissions as for sale. *Runyon v. Wilkinson, Gaddis & Co.*, 57 N. J. Law, 420, 31 Atl. 390; *Dwyer v. Raborn*, 6 Wash. 213, 33 Pac. 350. Where a broker has produced a purchaser ready and willing to contract on the terms stipulated, a subse-

principal, is not necessary if the purchaser procured by the broker stands ready to perform.<sup>16</sup>

*Same—Responsible Purchaser*

It is a prerequisite to the broker's right to commissions that the proposed purchaser be financially able to carry out the contract.<sup>17</sup> The broker undertakes to furnish a purchaser; and, when one is presented, the employer is not bound to accept him or to pay the commission, unless he is ready and able to perform the contract on his part according to the terms proposed; but if the principal accepts him, either upon the terms previously proposed or upon modified terms then agreed upon, and a valid contract is entered into between the principal and the person presented by the broker, the commission is earned.<sup>18</sup> But if the principal rejects the purchaser, and the broker claims

quent agreement, without consideration, not to claim his commissions until delivery of the deed, is not binding on him. *McComb v. Von Ellert*, 7 Misc. Rep. 59, 27 N. Y. Supp. 372. A broker who is promised a commission for selling street car lines to a certain syndicate, or to a corporation organized by such syndicate, is entitled to the commission on effecting a sale to a railroad company organized by the syndicate, though such company was not duly incorporated. *Smith v. Mayfield*, 60 Ill. App. 266.

<sup>16</sup> *Bibb v. Allen*, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819; *Ward v. Lawrence*, 79 Ill. 295; *Levy v. Ruff*, 4 Misc. Rep. 180, 23 N. Y. Supp. 1002; *Vaughan v. McCarthy*, 59 Minn. 199, 60 N. W. 1075. So, where a loan broker is employed to secure a loan for his principal, it is not essential to his right to commissions that he have a binding contract with the proposed lender. *Middleton v. Thompson*, 163 Pa. 112, 29 Atl. 796.

<sup>17</sup> *Pratt v. Hotchkiss*, 10 Ill. App. 603; *Coleman's Ex'r v. Meade*, 13 Bush (Ky.) 358; *Hayden v. Grillo*, 26 Mo. App. 289; *Chipley v. Leathe*, 60 Mo. App. 15. Under an agreement that a broker shall receive a commission for finding a purchaser for property, he is entitled thereto on introducing to his principal a purchaser to whom a sale is made, though the purchaser fails to meet deferred payments. *Hallack v. Hinckley*, 19 Colo. 38, 34 Pac. 479; *Stewart v. Fowler*, 53 Kan. 537, 36 Pac. 1002. Where the owner of personalty agreed to pay an agent a commission in case he should succeed "in disposing of" the property on acceptable terms, and the agent procured a purchaser who made a written contract with the owner to buy the goods, and to pay for the same partly with a deed to certain land, and such purchaser was unable to perform his contract, for want of title to such land, the agent was not entitled to commissions. *Greusel v. Dean*, 98 Iowa, 405, 67 N. W. 275. A real estate agent who offers his services to F. to effect an exchange of F.'s stock of goods for land belonging to T. is not entitled to compensation for bringing F. and T. together, where the negotiations fell through because T. had no title to the land which he proposed to exchange. *Freedman v. Gordon*, 4 Colo. App. 343, 35 Pac. 879; *Barber v. Hildebrand*, 42 Neb. 400, 60 N. W. 594; *Woolley v. Lowenstein*, 83 Hun, 155, 31 N. Y. Supp. 570; *Moskowitz v. Hornberger*, 15 Misc. Rep. 645, 38 N. Y. Supp. 114.

<sup>18</sup> *Coleman's Ex'r v. Meade*, 13 Bush (Ky.) 358; *Parker v. Estabrook*, 68 N. H. 349, 44 Atl. 484; *Odell v. Dozier*, 104 Ga. 203, 30 S. E. 813; *Alt v. Do-*

his commission, he must show, not only that the person furnished was willing to accept the offer precisely as made, but, in addition, that he was an eligible purchaser, and such as the principal was bound, as between himself and the broker, to accept.<sup>19</sup> When the principal rejects the proposed purchaser without cause and without objection to his pecuniary responsibility, the burden of proof is not on the broker to show that the purchaser was able to carry out the contract, in order that he may recover his commissions.<sup>20</sup>

*Performance within Time Given*

Where a broker has a definitely limited time within which to effect a sale of property, he is not entitled to compensation unless he performs his undertaking within that time.<sup>21</sup> When a sale within the

schcr, 102 App. Div. 344, 92 N. Y. Supp. 439, affirmed 186 N. Y. 566, 79 N. E. 1100.

<sup>19</sup> McGavock v. Woodlief, 20 How. 221, 15 L. Ed. 884; Coleman's Ex'r v. Meade, 13 Bush (Ky.) 358; Neiderlander v. Starr, 50 Kan. 766, 32 Pac. 359.

<sup>20</sup> Gerding v. Haskin, 2 Misc. Rep. 172, 21 N. Y. Supp. 636; Levy v. Ruff, 4 Misc. Rep. 180, 23 N. Y. Supp. 1002; Cook v. Kroemeke, 4 Daly (N. Y.) 268; Goss v. Broom, 31 Minn. 484, 18 N. W. 290. Solvency is presumed in the absence of evidence to the contrary. Hart v. Hoffman, 44 How. Prac. (N. Y.) 168. Contra: Iselin v. Griffith, 62 Iowa, 668, 18 N. W. 302. Where the purchaser furnished by a broker is accepted by the seller, without any misrepresentation on the part of the broker as to such purchaser's financial standing, the burden of proof is on the seller to show that the purchaser is not able to pay for the goods according to the contract. Fairly v. Wappoo Mills, 44 S. C. 227, 22 S. E. 108, 29 L. R. A. 215. Where the proposed purchaser admits that he had not the ability to pay the price fixed, his testimony that he was acting in behalf of a syndicate, and that he would have been prepared, when the time arrived to complete the purchase, to find the money required, does not satisfactorily show his ability to buy. Mattingly v. Pennie, 105 Cal. 514, 39 Pac. 200, 45 Am. St. Rep. 87. In an action to recover commissions for the sale of land alleged to have fallen through on account of the principal's failure to procure a patent to the land within the time agreed on, the intended purchaser being unable to complete the purchase when the patent was secured, the agent cannot recover, unless he affirmatively proves that the purchaser had during the time the actual cash to make the payment; it not being sufficient to show that he had property out of which the price could have been made by suit. Dent v. Powell, 93 Iowa, 711, 61 N. W. 1043.

<sup>21</sup> McCarthy v. Cavers, 66 Iowa, 342, 23 N. W. 757; Watson v. Brooks, 11 Or. 271, 3 Pac. 679; Halperin v. Callender, 17 Misc. Rep. 362, 39 N. Y. Supp. 1044; Beauchamp v. Higgins, 20 Mo. App. 514; Zeimer v. Antisell, 75 Cal. 509, 17 Pac. 642. A real estate broker who produces a customer after his principal has withdrawn his offer to sell is not entitled to a commission. Young v. Trainor, 158 Ill. 428, 42 N. E. 139, affirming 57 Ill. App. 632. Where the minds of vendor and purchaser have met on a contract to sell real estate, the broker who procured the execution of such contract is entitled to recover his promised commission, whether or not the contract is finally consummated, and notwithstanding any vagueness in its terms. Folinsbee v. Sawyer, 15 Misc. Rep. 293, 36 N. Y. Supp. 405. Where an application for a loan is made to a

time limited is prevented by the negligence, fault, or fraud of the principal, the broker can recover his commissions.<sup>22</sup> He is entitled to compensation when he produces a purchaser within the time, to whom a sale is made after the time has expired.<sup>23</sup>

*Sale Completed by Principal—Broker Procuring Cause*

A broker earns his commission whenever the sale or other business about which he is employed is effected through his agency. But he need not conduct the transaction in person. After the broker has produced a purchaser, the negotiation may be concluded by the principal in person, and the broker will be entitled to his commission.<sup>24</sup> If the broker was the procuring cause of the sale, he can recover;<sup>25</sup>

broker, who secures a party willing to make the loan, but does not so notify the applicant, and, after the time has elapsed within which the broker was to place the loan has expired, the applicant, without knowledge of the steps taken by the broker, secures the loan from the same person with whom the latter had arranged to place it, the broker is not entitled to commission. *Biddison v. Johnson*, 50 Ill. App. 173. But see *Schramm v. Wolff* (Tex. Civ. App.) 126 S. W. 1185. Where a contract with a broker to sell a note and mortgage is silent as to the time within which the sale is to be made, the broker is entitled to a reasonable time. *Peterson v. Hall*, 61 Minn. 268, 63 N. W. 733.

<sup>22</sup> *Fultz v. Wimer*, 34 Kan. 576, 9 Pac. 316; *Oullahan v. Baldwin*, 100 Cal. 648, 35 Pac. 310; *Wilson v. Sturgis*, 71 Cal. 226, 16 Pac. 772. A real estate agent employed to sell land within a certain time, on certain terms, is entitled to his commissions where he procures a purchaser within the time willing to buy, and communicates that fact to the owner; and the owner, by deferring the meeting with the purchaser until after the time of the agent's employment has expired, cannot defeat his right. *Vanderveer v. Suydam*, 83 Hun, 116, 31 N. Y. Supp. 392.

<sup>23</sup> *Goffe v. Gibson*, 18 Mo. App. 1; *Wilson v. Sturgis*, 71 Cal. 226, 16 Pac. 772; *Crowley Co. v. Myers*, 69 N. J. Law, 245, 55 Atl. 305; *Cody v. Dempsey*, 86 App. Div. 335, 83 N. Y. Supp. 899. But it is not enough that "seeds were sown." *Donovan v. Weed*, 182 N. Y. 43, 74 N. E. 563.

<sup>24</sup> *Martin v. Silliman*, 53 N. Y. 615; *Ludlow v. Carman*, 2 Hilt. (N. Y.) 107; *Timberman v. Craddock*, 70 Mo. 638; *Bass v. Jacobs*, 63 Mo. App. 393; *Loud v. Hall*, 106 Mass. 404; *Bornstein v. Lans*, 104 Mass. 214; *Dowling v. Morrill*, 165 Mass. 491, 43 N. E. 295; *Howe v. Werner*, 7 Colo. App. 530, 44 Pac. 511. The broker need not be present during the negotiations or at the completion of the bargain. *Dreisback v. Rollins*, 39 Kan. 268, 18 Pac. 187; *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 441; *Baker v. Thomas*, 11 Misc. Rep. 112, 31 N. Y. Supp. 993; *Rigdon v. Moore*, 226 Ill. 382, 80 N. E. 901; *Reishus-Remer Land Co. v. Benner*, 91 Minn. 401, 98 N. W. 186.

<sup>25</sup> *Pope v. Beals*, 108 Mass. 561; *Royster v. Mageveney*, 9 Lea (Tenn.) 148; *Earp v. Cummins*, 54 Pa. 394, 93 Am. Dec. 718; *Lloyd v. Matthews*, 51 N. Y. 124; *Redfield v. Tegg*, 38 N. Y. 212. The completed transaction need not result in a benefit to the principal. *Schwartz v. Yearly*, 31 Md. 270. An owner of real estate, after her efforts to sell to W. had failed and been abandoned, put it in the hands of a real estate agent to sell at a certain price. He then commenced negotiations with W., and, while it still remained in his hands, without notice to him, the owner sold it to W., for a less price than

otherwise, he cannot.<sup>26</sup> The principal need not know, at the time the sale was completed, that the purchaser was obtained through the broker's efforts.<sup>27</sup> Nor need the broker have introduced the purchaser to the principal,<sup>28</sup> or even know the purchaser himself.<sup>29</sup> Thus, where the one who purchases the principal's property first learns that it is for sale from the advertisements of the broker,<sup>30</sup> or from a third person to whom the broker had communicated the fact.<sup>31</sup>

that at which the agent had been authorized to sell. Held, that he was entitled to commissions on the amount for which it was sold. *Schlegel v. Allerton*, 65 Conn. 260, 32 Atl. 363. Where a real estate agent, with whom land has been placed for sale, places it with another, reserving the right to sell the land himself, he cannot sell the land to a customer of the latter, and thereby defeat the latter's right to his commissions. *Leonard v. Roberts*, 20 Colo. 88, 36 Pac. 880. Where an agent's authority to sell lands upon certain terms is revoked, and the owner, in good faith, thereafter sells upon less favorable terms to one who had declined to purchase from the agent, such agent is not entitled to commissions. *Bailey v. Smith*, 103 Ala. 641, 15 South. 900. A real estate broker is not entitled to commissions on a sale of land where the purchaser bought solely upon his own information, after negotiating with the owners, and was not influenced by the broker, though the broker made efforts to sell the land to such purchaser. *Brown v. Shelton* (Tex. Civ. App.) 23 S. W. 483. Where a real estate agent brings the parties together, and negotiations are thus opened between them, which continue without withdrawal of either party therefrom, and culminate in a sale, though on different terms than originally arranged, the broker is entitled to his commissions. *Jones v. Henry*, 15 Misc. Rep. 151, 36 N. Y. Supp. 483. See, also, *Woods v. Lowe*, 207 Mass. 1, 92 N. E. 772; *Haase v. Ullmann*, 148 App. Div. 40, 131 N. Y. Supp. 1050.

<sup>26</sup> *Stewart v. Mather*, 32 Wis. 344; *Wyckoff v. Bliss*, 12 Daly (N. Y.) 324; *Sussdorff v. Schmidt*, 55 N. Y. 319; *McClave v. Paine*, 49 N. Y. 561, 10 Am. Rep. 431; *Tyler v. Parr*, 52 Mo. 249; *Carter v. Webster*, 79 Ill. 435. Where a broker employed to procure a customer sends to his principal one with whom the latter, without the broker's knowledge, is already negotiating, and the principal, ignorant that the broker and customer have had any communication, deals with the customer, the broker, whose acts had no influence in effecting the trade, is not entitled to commission. *Neufeld v. Oren*, 60 Ill. App. 350.

<sup>27</sup> *Lloyd v. Matthews*, 51 N. Y. 124; *Hanford v. Shapter*, 4 Daly (N. Y.) 243; *Kelly v. Stone*, 94 Iowa, 316, 62 N. W. 842; *Bryan v. Abert*, 3 App. D. C. 180. But see *Soule v. Deering*, 87 Me. 365, 32 Atl. 998. See *Gilbert v. McCullough*, 146 Iowa, 333, 125 N. W. 173; *McLaughlin v. Campbell*, 78 N. J. Law, 541, 74 Atl. 530.

<sup>28</sup> *Royster v. Mageveney*, 9 Lea (Tenn.) 148; *Wylie v. Marine Nat. Bank of City of New York*, 61 N. Y. 415; *Anderson v. Cox*, 16 Neb. 10, 20 N. W. 10. But see *Getzler v. Boehm*, 16 Misc. Rep. 390, 38 N. Y. Supp. 52.

<sup>29</sup> *Derrickson v. Quimby*, 43 N. J. Law, 373; *Lincoln v. McClatchie*, 36 Conn. 136; *Wylie v. Marine Nat. Bank of City of New York*, 61 N. Y. 415. And see *Newhall v. Pierce*, 115 Mass. 457.

<sup>30</sup> *Earp v. Cummins*, 54 Pa. 394, 93 Am. Dec. 718.

<sup>31</sup> *Anderson v. Cox*, 16 Neb. 10, 20 N. W. 10; *Lincoln v. McClatchie*, 36 Conn. 136. Where a broker talks about land which he has for sale (the own-

When a broker, having been unsuccessful in finding a purchaser, abandons the undertaking, he does not become entitled to a commission if the property is subsequently sold to one to whom he had tried to sell, but failed.<sup>32</sup>

### *Sale Prevented by Principal*

A broker has performed his duty when he finds some one who is ready, willing, and able to purchase on the terms proposed by his principal. When the contract which the principal desires to enter into has been made, the broker is entitled to his commissions. The principal cannot deprive the broker of this right by subsequently releasing the purchaser from his contract to buy; nor, if the purchaser refuses to perform, can a principal, who refuses to bring an action for specific performance, set up the purchaser's breach of the contract of sale as a defense to the broker's action for compensation.<sup>33</sup> It would be no defense to say that a bill to enforce specific performance would be of no avail on account of the purchaser's insolvency. The principal was not bound to accept the proposed purchaser, unless he was able to perform.<sup>34</sup>

When performance by a broker is prevented by his principal, the broker is, nevertheless, entitled to compensation. The principal cannot, by refusing to complete the contract when a proper customer is

er retaining a right to sell it) to one who, not acting for the broker, mentions it to a third person, who purchases from the owner he is not entitled to a commission. *Gleason v. Nelson*, 162 Mass. 245, 38 N. E. 497.

<sup>32</sup> *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 441; *Wylie v. Marine Nat. Bank of City of New York*, 61 N. Y. 415; *Holley v. Townsend*, 2 Hilt. (N. Y.) 34; *Bouscher v. Larkins*, 84 Hun, 288, 32 N. Y. Supp. 305; *Earp v. Cummins*, 54 Pa. 394, 93 Am. Dec. 718. Cf. *Ware v. Dos Passos*, 4 App. Div. 32, 38 N. Y. Supp. 673. A real estate broker is not entitled to commissions for procuring a purchaser for lands where the sale is abandoned with his own consent. *Sawyer v. Bowman*, 91 Iowa, 717, 59 N. W. 27. *Kifer v. Yoder*, 198 Pa. 308, 47 Atl. 974; *Butterfield v. Consolidated Coal Co.*, 42 Utah, 499, 132 Pac. 559; *Burchell v. Gowrie* [1910] App. Cas. 614.

<sup>33</sup> *Parker v. Walker*, 86 Tenn. 566, 8 S. W. 391; *Love v. Miller*, 53 Ind. 294, 21 Am. Rep. 192. But where the contract entered into contains a stipulation that, in case either party should fail to comply with the contract, a forfeiture of \$1,000 should be paid by the party in default, the broker is not entitled to his commission if the purchaser does not perform. *Bennett v. Egan*, 3 Misc. Rep. 421, 23 N. Y. Supp. 154; *Kimberly v. Henderson*, 29 Md. 512; *Aigler v. Carpenter Place Land Co.*, 51 Kan. 718, 33 Pac. 593. But see *Richards v. Jackson*, 31 Md. 250, 1 Am. Rep. 49. In *Gilder v. Davis*, 137 N. Y. 504, 33 N. E. 599, 20 L. R. A. 398, the broker was in a similar case given a commission on the forfeit money. And see *Seabury v. Fidelity Ins., Trust & Safe Deposit Co.*, 205 Pa. 234, 54 Atl. 898; *Duke v. Graham*, 163 Iowa, 272, 143 N. W. 817.

<sup>34</sup> See ante, p. 212.



produced by the broker, escape liability to the latter.<sup>85</sup> Nor does a defect in the principal's title, which causes the purchaser to reject it, relieve the principal,<sup>86</sup> unless the broker knew of the defect.<sup>87</sup> Where

<sup>85</sup> *Middleton v. Thompson*, 163 Pa. 112, 29 Atl. 796; *McGuire v. Carlson*, 61 Ill. App. 295; *Cook v. Fiske*, 12 Gray (Mass.) 491; *Felts v. Butcher*, 93 Iowa, 414, 61 N. W. 991; *Nesbitt v. Helser*, 49 Mo. 383; *Reeves v. Vette*, 62 Mo. App. 440; *Goss v. Stevens*, 32 Minn. 472, 21 N. W. 549; *Riemer v. Rice*, 88 Wis. 16, 59 N. W. 450; *Kock v. Emmerling*, 22 How. 69, 16 L. Ed. 292; *Watson v. Brooks* (C. C.) 8 Sawy. 316, 13 Fed. 540. Where the principal sold the property himself, but permitted the broker to make further efforts to secure a purchaser without informing him of the sale, he was held liable for commissions. *Lane v. Albright*, 49 Ind. 275. So, where a purchaser is procured by the broker, and the principal gives an option for a limited time to the proposed purchaser, but sells to another within that time, the broker may recover commissions. *Reed's Ex'rs v. Reed*, 82 Pa. 420. A real estate agent, who procures a purchaser able, ready, and willing to take the property, and pay for it at the price agreed, and who is prevented from doing so by his principal's refusal to carry out the contract, is entitled to compensation, though the purchaser could not have been compelled to carry out his contract if he had chosen to set up the statute of frauds. *Holden v. Starks*, 159 Mass. 503, 34 N. E. 1069, 38 Am. St. Rep. 451. Defendant employed plaintiff as a broker to sell goods at a certain commission. Plaintiff procured a purchaser, to whom defendant shipped the goods, but they were rejected by him as not of the quality specified. Held, that plaintiff, having performed his part of the contract, was entitled to his commission. *Strong v. Prentice Brownstone Co.*, 6 Misc. Rep. 57, 26 N. Y. Supp. 85. Where a landowner refuses to execute a deed pursuant to the terms of sale made by his authorized agent, neither the agent nor the purchaser need tender the purchase money before the agent can sue for his services. *Vaughan v. McCarthy*, 59 Minn. 199, 60 N. W. 1075. A broker who agrees to procure a loan performs his contract when he secures a company able, willing, and ready to make the loan, and need not tender or cause to be tendered the amount of the loan before he is entitled to his compensation. *Phister v. Gove*, 48 Mo. App. 455; *Telford v. Brinkerhoff*, 45 Ill. App. 586. One may recover in an action on a contract to pay him a certain sum on securing a purchaser for defendant's land, where it appeared that he conducted to the premises one with whom defendant afterwards entered into a written agreement for the sale of the land, though the land was in fact sold to another. *Boland v. Kistle*, 92 Iowa, 369, 60 N. W. 632. Where real estate brokers procure a contract for the sale of land, and the vendor voluntarily releases the purchaser from his obligation, the brokers are still entitled to their commissions. *Granger v. Griffin*, 43 Ill. App. 421; *Foster v. Wynn*, 51 Ill. App. 401. A real estate agent who procures a purchaser ready and willing to purchase land on the terms on which he was employed to sell is entitled to his commissions, though the vendor, with knowledge thereof, voluntarily completes the sale on different terms. *Corbel v. Beard*, 92 Iowa, 360, 60 N. W. 636. And see *Owen v. Riddle*, 81 N. J. Law, 546, 79 Atl. 886, Ann. Cas. 1912D, 45; *Dorlon v. Forrest*, 101 App. Div. 32, 91 N. Y. Supp. 431.

<sup>86</sup> *Knapp v. Wallace*, 41 N. Y. 477; *Doty v. Miller*, 43 Barb. (N. Y.) 529; *Glentworth v. Luther*, 21 Barb. (N. Y.) 145; *Allen v. James*, 7 Daly (N. Y.) 13; *Gonzales v. Broad*, 57 Cal. 224; *Stange v. Gosse*, 110 Mich. 153, 67 N.

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<sup>87</sup> See footnote 37 on following page.

the principal sees that the broker is about to effect a sale, he cannot cut off the latter's right to commissions, by any fraudulent device.<sup>38</sup> When the purchaser refuses to perform because of false representations made by the owner respecting the property, this will not deprive the broker of his commissions.<sup>39</sup>

*Exclusive Agency—More Than One Broker Employed*

When an owner of property lists it with a broker for sale, he does not, without an express agreement, give the broker the exclusive right to sell. The owner may, of course, agree not to sell himself or through any other agent.<sup>40</sup> In the absence of such an agreement, the principal

W. 1108; *Roberts v. Kimmons*, 65 Miss. 332, 3 South. 736; *Sullivan v. Hampton* (Tex. Civ. App.) 32 S. W. 235; *Goodridge v. Holladay*, 18 Ill. App. 363; *Davis v. Morgan*, 96 Ga. 518, 23 S. E. 417; *Davis v. Lawrence*, 52 Kan. 383, 34 Pac. 1051; *Topping v. Healey*, 3 Fost. & F. 325. But see *Tombs v. Alexander*, 101 Mass. 255, 3 Am. Rep. 349; *Rockwell v. Newton*, 44 Conn. 333; *Blankenship's Adm'r v. Ryerson*, 50 Ala. 426. Refusal of the principal's wife to release her dower does not relieve him of liability to the broker. *Clapp v. Hughes*, 1 Phila. (Pa.) 382; *Hamlin v. Schulte*, 34 Minn. 534, 27 N. W. 301. But see *Hill v. Jones*, 152 Pa. 433, 25 Atl. 834. A broker employed to obtain a loan is, in the absence of a condition to the contrary, entitled to commissions on obtaining a person able and willing to make the loan, though it is not consummated because the title to the premises on which the loan was to be made is defective, in that the building thereon encroaches on adjoining property. *Egan v. Kieferdorf*, 16 Misc. Rep. 385, 38 N. Y. Supp. 81. But contra under a contract making compensation depend on the payment of the purchase price. *Cremer v. Miller*, 56 Minn. 52, 57 N. W. 318. In *Condict v. Cowdrey*, 139 N. Y. 273, 34 N. E. 781, it was held that a broker was not entitled to commissions where the contract of purchase was conditional on the title being found as represented, and investigation showed that the principal had no title.

See, also, *Monk v. Parker*, 180 Mass. 246, 63 N. E. 793; *Stange v. Gosse*, 110 Mich. 153, 67 N. W. 1108.

<sup>37</sup> *Hart v. Hopson*, 52 Mo. App. 177; *Hoyt v. Shipherd*, 70 Ill. 309; *Brady v. Maddox* (Tex. Civ. App.) 124 S. W. 739. Contra: *Martin v. Ede*, 103 Cal. 157, 37 Pac. 199.

<sup>38</sup> *Stewart v. Mather*, 32 Wis. 344; *Fox v. Byrnes*, 52 N. Y. Super. Ct. 150; *Briggs v. Boyd*, 56 N. Y. 289; *Keys v. Johnson*, 68 Pa. 42; *Reed's Ex'rs v. Reed*, 82 Pa. 420; *Lane v. Albright*, 49 Ind. 275; *Doonan v. Ives*, 73 Ga. 295. And see *Bash v. Hill*, 62 Ill. 216; *Nesbitt v. Helser*, 49 Mo. 383. A vendor cannot escape liability for commissions to the agent employed to negotiate a sale of the land, on completing himself a sale to a purchaser with whom the agent had been negotiating, by including in the sale other lands in addition to those the agent was employed to sell. *Ranson v. Weston*, 110 Mich. 240, 68 N. W. 152.

<sup>39</sup> *Glentworth v. Luther*, 21 Barb. (N. Y.) 145; *Dotson v. Milliken*, 209 U. S. 237, 28 Sup. Ct. 489, 52 L. Ed. 768. But see *Curtiss v. Mott*, 90 Hun, 439, 35 N. Y. Supp. 983; *Hess v. Investors' & Traders' Realty Co.*, 67 Misc. Rep. 390, 123 N. Y. Supp. 243.

<sup>40</sup> *Ward v. Fletcher*, 124 Mass. 224; *Stringfellow v. Powers*, 4 Tex. Civ. App. 199, 23 S. W. 313; *Levy v. Rothe*, 17 Misc. Rep. 402, 39 N. Y. Supp.

may effect a sale independently of the broker's efforts; and, if he do so, he will not be liable to the broker for the payment of commissions.<sup>41</sup> It has, however, been intimated in some cases that the broker is entitled to a reasonable time within which to make a sale.<sup>42</sup> Not only may the principal sell himself, but he may employ other brokers to sell the property, and he will be bound to pay commissions only to the one who secures a purchaser.<sup>43</sup> A sale by one broker is a

1057. An exclusive agency may be given by contract, and the principal may agree to pay a commission if he sells himself within the time given the broker. *Levy v. Rothe*, 17 Misc. Rep. 402, 39 N. Y. Supp. 1057; *Rucker v. Hall*, 105 Cal. 425, 38 Pac. 962; *Holland v. Howard*, 105 Ala. 538, 17 South. 35. One who agrees to allow a real estate broker commissions on sales of land made by himself is not liable for commissions upon making a conveyance, absolute on its face, but which in fact is a mortgage. *Terry v. Willson's Estate*, 50 Minn. 570, 52 N. W. 973.

<sup>41</sup> *McClave v. Paine*, 49 N. Y. 561, 10 Am. Rep. 431; *Hay v. Platt*, 66 Hun, 488, 21 N. Y. Supp. 362; *Carlson v. Nathan*, 43 Ill. App. 364; *Metzen v. Wyatt*, 41 Ill. App. 487; *Vandyke v. Walker*, 49 Mo. App. 381; *Lawrence v. Weir*, 3 Colo. App. 401, 33 Pac. 646. The broker did not have the exclusive right to sell. After he had found a purchaser ready and willing to buy on the owner's terms, but before he had notified the owner thereof, the owner found another purchaser, and closed a sale with him. Held, the owner was not liable to the broker for a commission. *Baars v. Hyland*, 65 Minn. 150, 67 N. W. 1148. But see *Carroll v. Pettit*, 67 Hun, 418, 22 N. Y. Supp. 250.

<sup>42</sup> *Charlton v. Wood*, 11 Heisk. (Tenn.) 19.

The rule is otherwise; but there may be special circumstances, from which it may be inferred that the broker is entitled to a reasonable time. *Peterson v. Hall*, 61 Minn. 268, 63 N. W. 733; *Jaekel v. Caldwell*, 156 Pa. 266, 26 Atl. 1063; *Glover v. Henderson*, 120 Mo. 367, 25 S. W. 175, 41 Am. St. Rep. 695; *Bathrick v. Coffin*, 13 App. Div. 101, 43 N. Y. Supp. 313. See *Mechem*, Ag. (2d Ed.) § 2450.

<sup>43</sup> *Ward v. Fletcher*, 124 Mass. 224; *Dreyer v. Rauch*, 42 How. Prac. (N. Y.) 22; *Livezy v. Miller*, 61 Md. 336; *Mears v. Stone*, 44 Ill. App. 444; *Jenks v. Nobles*, 42 Ill. App. 33; *Brennan v. Roach*, 47 Mo. App. 290. A real estate broker who procures a purchaser for realty, and brings the parties together, is entitled to his commission, although the sale is consummated by another broker upon different terms. *Wood v. Wells*, 103 Mich. 320, 61 N. W. 503. Plaintiff, having been employed as broker to sell property for defendant, introduced another broker as a customer, but the negotiations were unsuccessful. Afterwards defendant employed the broker so introduced, and he consummated a sale. Held, that plaintiff was not entitled to the commission. *Latshaw v. Moore*, 53 Kan. 234, 36 Pac. 342. A broker is not entitled to commissions for a sale where the customer found by him, having declined to purchase, thereafter calls the attention of a third party to the land, who completes the purchase through another agent. *Thuner v. Kanter*, 102 Mich. 59, 60 N. W. 299. A broker under a contract for commissions for introducing a purchaser ready and willing to buy is not entitled thereto for introducing a person at the time not ready or willing to buy, though a few weeks later he is introduced by another broker, through whose efforts a sale is made to him. *Platt v. Johr*, 9 Ind. App. 58, 36 N. E. 294.

revocation of the authority of the others without any notice to them;<sup>44</sup> and a broker will not, by subsequently producing a purchaser, have any claim on the principal for commissions.<sup>45</sup>

If a broker who first procures a purchaser reports his offers to his principal without identifying the person from whom they come, he cannot recover commissions in case of a subsequent sale through another broker at the same price, to the same purchaser, unless it appears in evidence that the seller knew this fact, or that notice was given him by the plaintiff before the completion of the contract and payment of commissions to the second broker.<sup>46</sup> If there be but one broker employed, he can with safety withhold the name of the purchaser until the sale shall have been made.<sup>47</sup> But, as the employment of one broker does not preclude the employment of another to procure a purchaser for the same property, it becomes, therefore, the duty of the broker who procures one, and who looks to the security of his commissions, to report the name and offer to his principal, that the latter may be notified in time, and thus put upon his guard before he pays the commissions to another.<sup>48</sup>

### *Effect of Requiring a License*

In many instances, statutes and ordinances, mainly for purposes of raising revenue, require brokers to take out licenses. If a broker fails to comply with such a requirement, he cannot recover commissions for business transacted by him.<sup>49</sup> To prevent such a recovery, it is not necessary that the statute declare the contract to pay commissions void.<sup>50</sup> But a broker bringing an action for commissions is not re-

<sup>44</sup> Ahern v. Baker, 34 Minn. 98, 24 N. W. 341. Withdrawing the sale of the property from one is not notice to the others, or a revocation of their authority. Lloyd v. Matthews, 51 N. Y. 124. Where two brokers are employed to secure a loan, acceptance of a loan negotiated by one is a revocation of the other's authority. Glenn v. Davidson, 37 Md. 365. See, also, McClave v. Paine, 49 N. Y. 561, 10 Am. Rep. 431; White v. Benton, 121 Iowa, 354, 96 N. W. 876; Kelly v. Brennan, 55 N. J. Eq. 423, 37 Atl. 137. Contra: Woodall v. Foster, 91 Tenn. 195, 18 S. W. 241.

<sup>45</sup> Ahern v. Baker, 34 Minn. 98, 24 N. W. 341.

<sup>46</sup> Tinges v. Moale, 25 Md. 480, 90 Am. Dec. 73; Eggleston v. Austin, 27 Kan. 245; Clifford v. Meyer, 6 Ind. App. 633, 34 N. E. 23; Feist v. Jerolamon, 81 N. J. Law, 437, 75 Atl. 751.

<sup>47</sup> Weeks v. Theodore Smith & Sons Co., 79 N. J. Law, 388, 75 Atl. 773.

<sup>48</sup> Vreeland v. Vetterlein, 33 N. J. Law, 247; Tinges v. Moale, 25 Md. 480, 90 Am. Dec. 73; Gilbert v. McCullough, 146 Iowa, 333, 125 N. W. 173.

<sup>49</sup> Chadwick v. Collins, 26 Pa. 138; Johnson v. Hulings, 103 Pa. 498, 49 Am. Rep. 131; Holt v. Green, 73 Pa. 198, 13 Am. Rep. 737; Hustis v. Pickands, 27 Ill. App. 270; Whitfield v. Huling, 50 Ill. App. 179; Stevenson v. Ewing, 87 Tenn. 46, 9 S. W. 230; Richardson v. Brix, 94 Iowa, 626, 63 N. W. 325; Yount v. Denning, 52 Kan. 629, 35 Pac. 207.

<sup>50</sup> Holt v. Green, 73 Pa. 198, 13 Am. Rep. 737; Yount v. Denning, 52 Kan.

quired to show that he had a license.<sup>51</sup> If it appears on the trial that he did not have the required license, his action will fail.<sup>52</sup> A statute requiring brokers to be licensed does not apply to one employed on a salary,<sup>53</sup> nor to one not engaged in business as a broker regularly, but merely negotiating a single transaction.<sup>54</sup>

## SAME—RIGHT TO REIMBURSEMENT AND INDEMNITY

11. A broker is entitled to reimbursement for money expended on his principal's account, and to indemnity for liabilities incurred in the execution of his agency.

A principal is not generally liable for his broker's expenses.<sup>55</sup> It is presumed that the commissions paid when the broker is successful cover all expenses incurred by him; and, when not successful, the loss is on the broker, he having taken that risk by making his compensation and reimbursement dependent on success.<sup>56</sup> It has, however, been held that a broker would be entitled to recover for expenses incurred by him when the principal does not give him a reasonable time to per-

629, 35 Pac. 207. Contra: *Fairly v. Wappoo Mills*, 44 S. C. 227, 22 S. E. 108, 29 L. R. A. 215; *Fuerst v. Stone*, 192 Ill. App. 256; *Douthart v. Congdon*, 197 Ill. 349, 64 N. E. 348, 90 Am. St. Rep. 167; *Black v. Security Mut. Life Ass'n*, 95 Me. 35, 49 Atl. 51, 54 L. R. A. 939; *Luce v. Cook*, 227 Pa. 224, 75 Atl. 1098; *Pile v. Carpenter*, 118 Tenn. 288, 99 S. W. 960.

But there are many cases contra, usually upon the ground that the statute is intended for revenue only. *Toole v. Wiregrass Development Co.*, 142 Ga. 57, 82 S. E. 514; *Ruckman v. Bergholz*, 37 N. J. Law, 437; *Woodward v. Stearns*, 10 Abb. Prac. N. S. (N. Y.) 395.

<sup>51</sup> *Shepler v. Scott*, 85 Pa. 329.

<sup>52</sup> *Johnson v. Hulings*, 103 Pa. 498, 49 Am. Rep. 131; *Holt v. Green*, 73 Pa. 198, 13 Am. Rep. 737.

<sup>53</sup> *Portland v. O'Neill*, 1 Or. 218. And see *Spear v. Bull*, 49 Ill. App. 348.

<sup>54</sup> *O'Neill v. Sinclair*, 153 Ill. 525, 39 N. E. 124; *Jackson v. Hough*, 38 W. Va. 236, 18 S. E. 575; *Chadwick v. Collins*, 26 Pa. 138; *Johnson v. Williams*, 8 Ind. App. 677, 36 N. E. 167.

<sup>55</sup> An insurance broker may recover of the assured the expense of the telegrams relating to the insurance sent at the latter's request, without proof that they were received by the parties to whom they were sent. *Ward v. Tucker*, 7 Wash. 399, 35 Pac. 126, 1086. Where one employed to sell mining land, he to receive all over a certain amount, devotes a large amount of time thereto, and performs labor and incurs large expenses to effect it, and is permitted to do so for a period of years, he is entitled to recover on a quantum meruit for his time, labor, and expenses if his authority is revoked. *Jaekel v. Caldwell*, 156 Pa. 266, 26 Atl. 1063.

<sup>56</sup> *Charlton v. Wood*, 11 Heisk. (Tenn.) 19; *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 441; *Reynolds-McGinness Co. v. Green*, 78 Vt. 28, 61 Atl. 556; *Thuner v. Kanter*, 102 Mich. 59, 60 N. W. 299.

form.<sup>57</sup> In such cases the expenditures are in reality on the broker's own account, not that of his principal. When, however, a broker lays out money in carrying out the orders of his principal, as when he buys property or pays insurance premiums, he is entitled to be reimbursed for such sums.<sup>58</sup> So, when a broker incurs liabilities in his principal's business, the latter must indemnify him against loss therefrom.<sup>59</sup>

### SAME—RIGHT TO A LIEN

12. Insurance brokers, stock brokers, and purchasing agents have general liens.
13. A loan broker has a lien which is probably particular.
14. Ship brokers and real estate brokers have no liens.

#### *Insurance Brokers*

Insurance brokers have a general lien for their commissions and for premiums paid by them, on the policies in their hands,<sup>60</sup> and on the moneys received under such policies in the event of a loss.<sup>61</sup> If the broker delivers the policy to his principal, his lien is gone.<sup>62</sup> But, if it should come into his hands again, the lien would revive,<sup>63</sup> unless the manner of his parting with the policy manifests an intention to abandon the lien.<sup>64</sup> A subagent of the broker has a particular lien on a policy in his hands for his expenditures and services in procuring that

<sup>57</sup> *Hill v. Jones*, 152 Pa. 433, 25 Atl. 834. And see *McFarland, J.*, in *Charlton v. Wood*, 11 Heisk. (Tenn.) 19, 26. See note 42, ante.

<sup>58</sup> *Knapp v. Simon*, 96 N. Y. 284; *Searing v. Butler*, 69 Ill. 575; *Zimmerman v. Weber*, 135 App. Div. 428, 120 N. Y. Supp. 483.

<sup>59</sup> *Maitland v. Martin*, 86 Pa. 120; *D'Arcy v. Lyle*, 5 Bin. (Pa.) 441; *Stocking v. Sage*, 1 Conn. 519; *Bennett v. Covington (C. C.)* 22 Fed. 816. But see *Carpenter v. Momsen*, 92 Wis. 449, 65 N. W. 1027, 66 N. W. 692. A broker employed to negotiate the sale of flour at a certain price, who, without express authority, makes a contract for the sale thereof at such price in his own name, cannot, on his principal's refusal to deliver at the price named, recover from the principal damages paid by him to the purchaser for his failure to perform the contract of sale. *Haas v. Ruston*, 14 Ind. App. 8, 42 N. E. 298, 56 Am. St. Rep. 288.

<sup>60</sup> *McKenzie v. Nevius*, 22 Me. 138, 38 Am. Dec. 291; *Cranston v. Philadelphia Insurance Co.*, 5 Bin. (Pa.) 538; *Moody v. Webster*, 3 Pick. (Mass.) 424.

<sup>61</sup> *Spring v. South Carolina Insurance Co.*, 8 Wheat. 268, 5 L. Ed. 614; *McKenzie v. Nevius*, 22 Me. 138, 38 Am. Dec. 291.

<sup>62</sup> *Cranston v. Philadelphia Insurance Co.*, 5 Bin. (Pa.) 538.

<sup>63</sup> *Moody v. Webster*, 3 Pick. (Mass.) 424.

<sup>64</sup> *Spring v. South Carolina Insurance Co.*, 8 Wheat. 268, 5 L. Ed. 614; *Sharp v. Whipple*, 1 Bosw. (N. Y.) 557.

policy, but not as against the insured, for a general balance due him from his principal, the broker.<sup>65</sup>

### *Stock Brokers*

Stock brokers generally stand in the relation of pledgees<sup>66</sup> to the principals, rather than holding a lien. When a broker buys stock or bonds for his principal, and advances most of the money to make the purchase, he holds the stock or bonds as collateral security,<sup>67</sup> and has power to sell after proper notice.<sup>68</sup> Stock brokers may, however, hold a lien, strictly speaking, on the property of their principals in their hands. Since, as already seen,<sup>69</sup> stock brokers are in reality factors, they have the same power to sell to reimburse themselves that factors have.<sup>70</sup>

### *Purchasing Agents*

Brokers whose business is to make purchases for their principals have a general lien on the goods in their hands for advances and commissions.<sup>71</sup> Such brokers are often called "purchasing factors."<sup>72</sup> A broker who is intrusted with the possession of goods which he is to sell becomes, by reason of such possession, a factor,<sup>73</sup> and so has a general lien.<sup>74</sup>

### *Loan Brokers*

A loan broker has been held to have a lien on the money borrowed while it remains in his hands for his commissions.<sup>75</sup> The courts, how-

<sup>65</sup> *McKenzie v. Nevius*, 22 Me. 138, 38 Am. Dec. 291; *Foster v. Hoyt*, 2 Johns. Cas. (N. Y.) 327; *Maanss v. Henderson*, 1 East, 335; *Snook v. Davidson*, 2 Camp. 218. The rule is the same where the subagent did not know that the broker who employed him was himself acting as an agent. *Bank of Metropolis v. New England Bank*, 1 How. 234, 11 L. Ed. 115; *Mann v. Forrester*, 4 Camp. 60; *Rabone v. Williams*, 7 Term R. 360.

<sup>66</sup> See post, p. 232; *Hale, Bailm. & Car.* 126, note 137.

<sup>67</sup> *Baker v. Drake*, 66 N. Y. 518, 23 Am. Rep. 80; *Stenton v. Jerome*, 54 N. Y. 480; *Vaupell v. Woodward*, 2 Sandf. Ch. (N. Y.) 143; *Thompson v. Toland*, 48 Cal. 99; *Worthington v. Tormey*, 34 Md. 182; *Hatch v. Douglas*, 48 Conn. 116, 40 Am. Rep. 154.

<sup>68</sup> *Hale, Bailm. & Car.* 165; *Brown v. Ward*, 3 Duer (N. Y.) 660; *Wallace v. Berdell*, 24 Hun (N. Y.) 379; *Canfield v. Minneapolis Agricultural & Mechanical Association (C. C.)* 14 Fed. 801.

<sup>69</sup> See ante, p. 190.

<sup>70</sup> 1 *Jones, Liens* (2d Ed.) § 421; monograph on *Factors*, p. 165; *Stewart v. Drake*, 46 N. Y. 449; *Hope v. Glendinning*, 1911, App. Cas. 419.

<sup>71</sup> *Bryce v. Brooks*, 26 Wend. (N. Y.) 367; *Stevens v. Robins*, 12 Mass. 180.

<sup>72</sup> See ante, p. 190.

<sup>73</sup> See ante, p. 189.

<sup>74</sup> See *Factors*, p. 175. Circumstances may make the lien of such a broker particular one. *Barry v. Boninger*, 46 Md. 59.

<sup>75</sup> *Vinton v. Baldwin*, 95 Ind. 433. Cf. *James' Appeal*, 89 Pa. 54. A broker

ever, have not given the question careful consideration, and it has not been determined what the exact nature of this lien is, or whether it is a general lien or a particular lien. It would seem, however, that the lien is a particular one, since general liens are not favored by the common law.<sup>76</sup> A usage of business in the market where the parties were dealing would be sufficient to establish a general lien.<sup>77</sup>

### *Ship Brokers*

Ship brokers have no lien on the ship concerning which they negotiate.<sup>78</sup> Thus, a broker has no lien for his services in procuring a charter party.<sup>79</sup> Nor has an agent who solicits freight.<sup>80</sup> The question of a ship broker's lien on papers in his hands has not been raised in any case which has come to the writer's notice.

### *Real Estate Brokers*

It is probable that a real estate broker has no lien on deeds, plats, etc., in his hands for his commissions and expenses.<sup>81</sup> In *Richards v. Gaskill*<sup>82</sup> it was held that such a lien existed for "work thereon, and for their commissions and advances." The case, however, is not well considered. Scriveners and conveyancers have a particular lien on papers in their hands for work done on such papers,<sup>83</sup> but such services are not performed as real estate brokers. A lien, in *Richards v. Gaskill*, was properly given for work in drawing the deed.

is entitled to a lien for commissions on a note and mortgage left in his possession for sale on commission. *Peterson v. Hall*, 61 Minn. 268, 63 N. W. 733.

<sup>76</sup> 1 Jones, Liens (2d Ed.) § 19; *Rushforth v. Hadfield*, 7 East, 224.

<sup>77</sup> *Green v. Farmer*, 4 Burrows, 2214, 2221.

<sup>78</sup> *The Thames* (D. C.) 10 Fed. 848; *The Crystal Stream* (D. C.) 25 Fed. 575; *The J. C. Williams* (D. C.) 15 Fed. 558. And see the *Paola R.* (C. C.) 32 Fed. 174; *Ferris v. The E. D. Jewett* (D. C.) 2 Fed. 111.

<sup>79</sup> *The Thames* (D. C.) 10 Fed. 848.

<sup>80</sup> *The Crystal Stream* (D. C.) 25 Fed. 575. And see *The J. C. Williams* (D. C.) 15 Fed. 558.

<sup>81</sup> *Arthur v. Sylvester*, 105 Pa. 233. In *Gresham v. Galveston Co.* (Tex. Civ. App.) 36 S. W. 796, it was held that a broker had a lien for his commission upon the notes given for deferred payments, entitling him to the possession of the notes for the purpose of collection. A real estate broker has no lien for services on a certificate of deposit placed in his hands by his principal, to be used, conditionally, in purchasing land. *Robinson v. Stewart*, 97 Mich. 454, 56 N. W. 853.

<sup>82</sup> 39 Kan. 428, 18 Pac. 494.

<sup>83</sup> *Hollis v. Claridge*, 4 Taunt. 807; *Steadman v. Hockley*, 15 Mees. & W. 553. A real estate broker, who is not an attorney at law, cannot claim a general lien on all securities in his possession for expenses incurred in managing some of such securities, but the lien is confined to the specific securities for which the expenses were incurred. *Carpenter v. Momsen*, 92 Wis. 449, 65 N. W. 1027.



## SAME—RIGHTS AGAINST AND LIABILITIES TO THIRD PERSONS

### 15. Against third persons, a broker has the usual rights of any agent.

#### *Rights Against Third Persons*

Brokers usually make their contracts in the name of their principals. But a broker may contract in his own name as apparent principal, or for a principal who is not disclosed. In any case the broker's rights against the person with whom the contract is made present no points calling for particular attention. The rules are the same as for agents in general.<sup>84</sup> So, in those cases where a broker has possession of his principal's goods, he has the usual rights of action against third persons who interfere with his possession.<sup>85</sup>

#### *Liabilities to Third Persons*

Brokers who make contracts for principals whom they disclose are not liable thereon personally.<sup>86</sup> They are liable when they do not disclose their principals.<sup>87</sup> A broker selling property in his possession, with a warranty, is liable for a breach of the warranty when he does not disclose the existence of his agency,<sup>88</sup> but not when he does,<sup>89</sup> if the warranty was within the scope of his authority.<sup>90</sup>

<sup>84</sup> See *Mechem, Ag. (2d Ed.)* § 2487; *Principal and Agent*, p. 84, ante. In *Farrow v. Commonwealth Ins. Co.*, 18 Pick. (Mass.) 53, 29 Am. Dec. 564, it was held that either the principal or the broker could sue on a policy of insurance made payable to the broker.

<sup>85</sup> See *Factors*, p. 181.

Where his personal rights are affected, he may of course sue. *Jarvis v. Manhattan Beach Co.*, 148 N. Y. 652, 43 N. E. 68, 31 L. R. A. 776, 51 Am. St. Rep. 727.

<sup>86</sup> *Wright v. Cabot*, 89 N. Y. 570; *Cabot Bank v. Morton*, 4 Gray (Mass.) 158; *McGraw v. Godfrey*, 14 Abb. Prac. N. S. (N. Y.) 397; *Knapp v. Simon*, 96 N. Y. 284.

<sup>87</sup> *Wright v. Cabot*, 89 N. Y. 570; *Knapp v. Simon*, 96 N. Y. 284; *Beebee v. Robert*, 12 Wend. (N. Y.) 413, 27 Am. Dec. 132; *Cobb v. Knapp*, 71 N. Y. 348, 27 Am. Rep. 51. A broker purchasing in his own name is liable to the carrier transporting the goods for demurrage. *Falkenburg v. Clark*, 11 R. I. 278. See *Principal and Agent*, p. 85, ante.

<sup>88</sup> *Merriam v. Wolcott*, 3 Allen (Mass.) 258, 80 Am. Dec. 69; *Wilder v. Cowles*, 100 Mass. 487; *Thompson v. McCullough*, 31 Mo. 224, 77 Am. Dec. 644; *Aldrich v. Jackson*, 5 R. I. 218; *Dumont v. Williamson*, 18 Ohio St. 515, 98 Am. Dec. 186; *Sere v. Faures*, 15 La. Ann. 189.

<sup>89</sup> *Morrison v. Currie*, 4 Duer (N. Y.) 79. He may bind himself personally by a contract to do so. *Wilder v. Cowles*, 100 Mass. 487. And see *Jarvis v. Manhattan Beach Co.*, supra.

<sup>90</sup> See *Principal and Agent*, p. 85, ante.

The liability of a broker for conversion by dealing with the goods of a third person in ignorance of the true owner's rights is unsettled. It seems to be conceded that a broker who has no possession of the goods, but merely sells or buys them for his principal, is not liable for conversion.<sup>91</sup> But, when the broker has possession of the property at any time, the cases are unsatisfactory and scarce.<sup>92</sup>

## RIGHTS AND LIABILITIES OF PRINCIPALS AND THIRD PERSONS

16. Principals, whether disclosed or not, may maintain actions on the contracts made for them by their brokers. They are liable to third persons on contracts made by their brokers within their authority.

### *Principal's Rights Against Third Persons*

The principal may sue third persons with whom his broker makes contracts for him. He may do this whether the broker, at the time of making the contracts, disclosed the name of the principal or not.<sup>93</sup> When the broker selling property does not have possession, the purchaser, when sued by the principal, cannot set off claims against the broker.<sup>94</sup> For injuries to his property in the hands of his broker, a principal has the usual rights of a general owner.<sup>95</sup>

### *Liabilities of Principal to Third Persons*

The liability of the principal for the contracts, torts, and other acts of his broker rests upon the same rules that relate to agents generally.<sup>96</sup> The principal is liable for all acts that are, or purport to be, within the actual powers or those that would usually be implied. Attention has already been called to the powers that are usually implied in the case of brokers.<sup>97</sup>

<sup>91</sup> *Fowler v. Hollins*, L. R. 7 Q. B. 616; *Thorp v. Robbins*, 68 Vt. 53, 33 Atl. 896.

<sup>92</sup> *Williams v. Merle*, 11 Wend. (N. Y.) 80, 25 Am. Dec. 604; *Fowler v. Hollins*, L. R. 7 Q. B. 616. And see *Factors*, p. 183. *Stock broker liable*. *Swim v. Wilson*, 90 Cal. 126, 27 Pac. 33, 13 L. R. A. 605, 25 Am. St. Rep. 110; *Bericich v. Marye*, 9 Nev. 312.

<sup>93</sup> *Graham v. Duckwall*, 8 Bush (Ky.) 12; *Mechem, Ag.* (2d Ed.) § 2052 et seq.; *Principal and Agent*, p. 84, ante.

<sup>94</sup> *Braden v. Louisiana State Ins. Co.*, 1 La. 220, 20 Am. Dec. 277; *Cooke v. Eshelby*, 12 App. Cas. 271; *Higgins v. Moore*, 34 N. Y. 417. But see *Kent v. De Coppet*, 149 App. Div. 589, 134 N. Y. S. 195. See *Principal and Agent*, p. 92, ante.

<sup>95</sup> *Mechem, Ag.* (2d Ed.) § 2493.

<sup>96</sup> *Mechem, Ag.* (2d Ed.) § 2494; *Principal and Agent*, p. 53, ante.

<sup>97</sup> *Ante*, §§ 3, 4.

## TERMINATION OF RELATION

17. The relation of principal and broker may be terminated
- (a) By expiration of the time for which the agency was created.
  - (b) By agreement of the parties.
  - (c) By notice by either party after a reasonable time, unless created for a definite time.
  - (d) By death of either party.

If a principal and broker, at the time the relation is established, agree that the relation shall continue for a definite time, when that time has expired the broker's authority will be at an end, and the relation terminated.<sup>98</sup> The parties may terminate the relation at any time by mutual agreement, whether created for a definite or an indefinite time. If the agency was established for a definite time, neither party could put an end to the contract without the consent of the other.<sup>99</sup> But, when no time for the continuance of the contract is fixed by its terms, either party is at liberty to terminate it at will, subject only to the ordinary requirements of good faith.<sup>1</sup> The contract of the parties may, however, without an express stipulation, require the continuance of the relation for a reasonable time. Where the performance of the broker's undertaking necessarily involves expenditures, the broker is entitled to a fair and reasonable opportunity to perform his obligation, subject, of course, to the right of the seller to sell independently.

<sup>98</sup> A broker's authority may be terminated by performance of his undertaking. *Walker v. Derby*, 5 Biss. 134, Fed. Cas. No. 17,068. The destruction of a house by fire is a revocation of a broker's authority to sell, and a subsequent sale of the lot by the owner to a purchaser to whom the broker had attempted to sell before the fire does not entitle the broker to commissions. *Cox v. Bowling*, 54 Mo. App. 289.

<sup>99</sup> *Brown v. Pforr*, 38 Cal. 550. An agreement to pay a broker a commission if he sells land within a month is not necessarily an agreement not to revoke the agency during the month. *Id.*

<sup>1</sup> *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 441; *Satterthwaite v. Vreeland*, 3 Hun (N. Y.) 152; *Brown v. Pforr*, 38 Cal. 550; *Doonan v. Ives*, 73 Ga. 295; *Wilson v. Dyer*, 12 Ind. App. 320, 39 N. E. 163; *Neal v. Lehman*, 11 Tex. Civ. App. 461, 34 S. W. 153; *Farmer v. Robinson*, 2 Camp. 339, note. Where a real estate broker for several months takes no steps to find a purchaser, the owner is justified in treating his conduct as an abandonment of all effort to sell the property. *Singer & Talcott Stone Co. v. Hutchinson*, 61 Ill. App. 308. Cf. *Vincent v. Woodland Oil Co.*, 165 Pa. 402, 30 Atl. 991. The broker must be given notice of the revocation of his authority. *Lamson v. Sims*, 48 N. Y. Super. Ct. 281; *Bash v. Hill*, 62 Ill. 216. One who has given a broker authority, until further notice, to sell land, has the burden to show that he revoked the authority before the broker found a purchaser. *Bourke v. Van Keuren*, 20 Colo. 95, 36 Pac. 882.

But, that having been granted him, the right of the principal to terminate his authority is absolute and unrestricted, except only that he may not do it in bad faith, and as a mere device to escape the payment of the broker's commissions. Thus, if, in the midst of negotiations instituted by the broker, and which were plainly and evidently approaching success, the seller should revoke the authority of the broker, with the view of concluding the bargain without his aid, and avoiding the payment of commissions about to be earned, it might well be said that the due performance of his obligation by the broker was purposely prevented by the principal. But if the latter acts in good faith, not seeking to escape the payment of commissions, but moved fairly by a view of his own interest, he has the absolute right before a bargain is made, while negotiations remain unsuccessful, before commissions are earned, to revoke the broker's authority; and the latter cannot thereafter claim compensation for a sale made by the principal, even though it be to a customer with whom the broker unsuccessfully negotiated, and even though, to some extent, the seller might justly be said to have availed himself of the fruits of the broker's labor.<sup>2</sup>

So, when a stock broker undertakes a transaction for a client which involves a carrying of stock by the broker, there is an implied agreement to continue the relation a reasonable time, provided the principal complies with his part of the contract.<sup>3</sup> If the principal does not keep up the margins agreed upon, the broker may, after proper notice, sell the stock.<sup>4</sup>

The death of either the principal or the broker puts an end to the latter's authority.<sup>5</sup>

In these as in other respects the termination of the relation is governed by the general rules of agency;° and in interpreting the fore-

<sup>2</sup> *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 44; *Kelly v. Marshall*, 172 Pa. 396, 33 Atl. 690. A contract of agency to sell lots, stipulating for additional pay to the agent should he sell them all in one year, gives him one year to sell them; and, though not engaging his whole time, it cannot be revoked by the principal so long as the agent is diligent in his business. *Glover v. Henderson*, 120 Mo. 367, 25 S. W. 175, 41 Am. St. Rep. 695.

<sup>3</sup> *White v. Smith*, 54 N. Y. 522; *Rogers v. Wiley*, 131 N. Y. 527, 30 N. E. 582; *Hess v. Rau*, 95 N. Y. 359.

<sup>4</sup> *Stenton v. Jerome*, 54 N. Y. 480; *Allen v. McConihe*, 124 N. Y. 342, 26 N. E. 812; *Rosenstock v. Tormey*, 32 Md. 169, 3 Am. Rep. 125.

<sup>5</sup> *Boone v. Clarke*, 3 Cranch, C. C. 389, Fed. Cas. No. 1,641; *Hunt v. Rousmanier*, 8 Wheat. (U. S.) 174, 5 L. Ed. 589; *Lincoln v. Emerson*, 108 Mass. 87; *Adriance v. Rutherford*, 57 Mich. 170, 23 N. W. 718; *Merrick's Estate*, 8 Watts & S. (Pa.) 402; *Hartford Fire Ins. Co. v. Wilcox*, 57 Ill. 180. But the death of the principal does not revoke the broker's authority where it is coupled with an interest, as where a stock broker is carrying stock on margins. *Hunt v. Rousmanier*, *supra*; *Hess v. Rau*, 95 N. Y. 359.

<sup>6</sup> See *Principal and Agent*, p. 41, *ante*.

going statements the distinction must not be overlooked between the power to revoke and the right to revoke an agent's authority.<sup>7</sup>

## MERCHANDISE BROKERS

### 18. Merchandise brokers negotiate the purchase and sale of goods without having possession.

Merchandise brokers are most nearly allied to factors. They differ from them as selling agents principally in not having the possession of the goods sold. When a broker for the sale of goods is intrusted with possession, he becomes a factor.<sup>8</sup> The differences in the implied powers of a merchandise broker<sup>9</sup> and a factor arise from the possession of the goods. Such a broker has implied power, in the absence of instructions on the point, to fix the price at which the purchase shall be made.<sup>10</sup> The power of merchandise brokers to bind both parties to the contract by the execution of bought and sold notes has already been considered.<sup>11</sup> There are various special kinds of merchandise brokers, who take their names from the articles in which they deal. Thus, we have grain brokers, produce brokers, sugar brokers, etc. Their rights and powers differ only as the customs and usages in their several kind of business differ.

## REAL ESTATE BROKERS

### 19. Real estate brokers negotiate the purchase, sale, and leasing of real property.

Most of the cases touching real estate brokers are on the question of their right to compensation. This has already been considered.<sup>12</sup> A real estate broker who is given authority to sell on terms definitely fixed by the principal may bind the latter by signing a written contract to sell,<sup>13</sup> though, of course, the broker cannot convey without a

<sup>7</sup> See *Principal and Agent*, p. 43, ante.

<sup>8</sup> Ante, p. 190. Cf. *Bragg v. Meyer*, 1 McAll. 408, Fed. Cas. No. 1,801.

<sup>9</sup> The implied powers of merchandise brokers selling goods were considered in treating of the implied powers of brokers generally. Ante, p. 192. Such a broker has no implied power to rescind a sale which he has made. *Saladin v. Mitchell*, 45 Ill. 79. Nor to receive payment. *Higgins v. Moore*, 34 N. Y. 417; *Western R. Co. v. Roberts*, 4 Phila. (Pa.) 110. For their right to commissions, see *Moses v. Bierling*, 31 N. Y. 462.

<sup>10</sup> Ante, p. 194.

<sup>11</sup> Ante, p. 195.

<sup>12</sup> Ante, p. 204.

<sup>13</sup> *Smith v. Armstrong*, 24 Wis. 446; *Pringle v. Spaulding*, 53 Barb. (N. Y.) 17; *Glentworth v. Luther*, 21 Barb. (N. Y.) 145; *Force v. Dutcher*, 18 N. J. Eq.

power of attorney;<sup>14</sup> and some cases have held that he has no authority to bind the principal by a contract to convey because of a mere authority "to sell" at a named price.<sup>15</sup>

Real estate brokers in many instances combine, with the business of selling real property, the care, management, and renting of such property. But such an agent, though he has power to make ordinary repairs, has no implied power to rebuild in case the buildings are destroyed by fire.<sup>16</sup> An agent for the care of property has been held to have no authority to bring suit in his own name, for the recovery of possession of the property from one claiming under a tax title.<sup>17</sup>

## BILL AND NOTE BROKERS

### 20. Bill and note brokers negotiate the purchase and sale of commercial paper.

Brokers who negotiate the purchase and sale of foreign bills of exchange are called "exchange brokers";<sup>18</sup> and so sometimes when they negotiate bills drawn on other places in this country.<sup>19</sup> When a bill or note broker acts in his own name, he is liable if the paper he sells proves not to be genuine.<sup>20</sup> The same is true when he does

401; *Smith v. Allen*, 86 Mo. 178. But see *Haydock v. Stow*, 40 N. Y. 363; *Roach v. Coe*, 1 E. D. Smith (N. Y.) 175; *Brady v. Fontenot*, 132 La. 826, 61 South. 838; *Stevens v. Odlin*, 109 Me. 417, 84 Atl. 899; *Woods v. Wilson* (Iowa) 158 N. W. 495.

<sup>14</sup> *Glentworth v. Luther*, 21 Barb. (N. Y.) 145; *Force v. Dutcher*, 18 N. J. Eq. 401. Cf. *Blood v. Goodrich*, 12 Wend. (N. Y.) 525, 27 Am. Dec. 152. See *Principal and Agent*, p. 5, ante.

<sup>15</sup> *Duffy v. Hobson*, 40 Cal. 240, 6 Am. Rep. 617; *Rutenberg v. Main*, 47 Cal. 213; *Morris v. Ruddy*, 20 N. J. Eq. 236; *Keim v. Lindley* (N. J. Eq.) 30 Atl. 1063; *Coleman v. Garrigues*, 18 Barb. (N. Y.) 60 (overruled *Haydock v. Stow*, 40 N. Y. 363); *Mannix v. Hildreth*, 2 App. D. C. 259. Where the terms of the sale are to be submitted to the principal, the broker has no authority to bind him by contract. *Furst v. Tweed*, 93 Iowa, 300, 61 N. W. 857; *Berry v. Tweed*, 93 Iowa, 296, 61 N. W. 858. But see *Smith v. Keeler*, 151 Ill. 518, 38 N. E. 250; *Rhode v. Gallat*, 70 Fla. 536, 70 South. 471; *Dodd v. Groos*, 175 Iowa, 47, 156 N. W. 845; *Record v. Littlefield*, 218 Mass. 483, 106 N. E. 142. And see *Stone v. United States Title Guaranty & Indemnity Co.*, 159 App. Div. 679, 144 N. Y. Supp. 849.

<sup>16</sup> *Beckman v. Wilson*, 61 Cal. 335.

<sup>17</sup> *McHenry v. Painter*, 58 Iowa, 365, 12 N. W. 338.

<sup>18</sup> *Black*, Law Dict. tit. "Broker."

<sup>19</sup> *Bouv*. Law Dict. tit. "Brokers."

<sup>20</sup> *Merriam v. Wolcott*, 3 Allen (Mass.) 258, 80 Am. Dec. 69; *Worthington v. Cowles*, 112 Mass. 30; *Thompson v. McCullough*, 31 Mo. 224, 77 Am. Dec. 644; *Lyons v. Miller*, 6 Grat. (Va.) 427, 52 Am. Dec. 129; *Aldrich v. Jackson*, 5 R. I. 218; *Bell v. Cafferty*, 21 Ind. 411.

not disclose the name of his principal, though the purchaser knows he is dealing with an agent.<sup>21</sup> The broker is not liable when he discloses the name of his principal, though the signatures of some of the parties are forged.<sup>22</sup> There is no implied warranty of the solvency of any of the parties to paper sold by a broker, whether his principal is disclosed or not.<sup>23</sup> A principal selling a note through a broker can reclaim the proceeds in the hands of the broker as long as they can be identified.<sup>24</sup> A principal has been held bound by representations made by his broker that the note he was selling was not usurious,<sup>25</sup> and that the principal was bound thereon as guarantor.<sup>26</sup> A bill broker having possession of paper which he sells has implied power to receive payment.<sup>27</sup>

## LOAN BROKERS

### 21. Loan brokers negotiate the lending of money.

What constitutes performance of the undertaking of a loan broker has already been considered.<sup>28</sup> A broker empowered to borrow money has implied authority to give to the lender the ordinary securities therefor.<sup>29</sup> An agent employed to loan money for the principal has, by implication, no power to loan it at an illegal rate. If the agent takes more than the legal rate, the principal will not be affected.<sup>30</sup> In some states the amount of commission which a broker may charge for procuring a loan is limited by statute.<sup>31</sup>

<sup>21</sup> *Morrison v. Currie*, 4 Duer (N. Y.) 79.

<sup>22</sup> *Worthington v. Cowles*, 112 Mass. 30; *Lyons v. Miller*, 6 Grat. (Va.) 427; *Merriam v. Wolcott*, 3 Allen (Mass.) 258, 80 Am. Dec. 69; *Thompson v. McCullough*, 31 Mo. 224, 77 Am. Dec. 644; *Huston v. Tyler*, 140 Mo. 252, 36 S. W. 654, 41 S. W. 795; *Bailey v. Galbreith*, 100 Tenn. 599, 47 S. W. 84.

<sup>23</sup> *Aldrich v. Jackson*, 5 R. I. 218.

<sup>24</sup> *Clark v. Merchants' Bank*, 1 Sandf. (N. Y.) 498.

<sup>25</sup> *Ahern v. Goodspeed*, 72 N. Y. 108.

<sup>26</sup> *Frevall v. Fitch*, 5 Whart. (Pa.) 325, 34 Am. Dec. 558.

<sup>27</sup> *Lentilhon v. Vorwerck, Hill & D.* (N. Y.) 443.

<sup>28</sup> *Ante*, p. 210.

<sup>29</sup> *Hatch v. Coddington*, 95 U. S. 48, 24 L. Ed. 339. Where a loan broker is applied to for a loan, he has implied authority to agree with the proposed lender that "full brief of title and searches, with opinion of counsel, will be required." *Middleton v. Thompson*, 163 Pa. 112, 29 Atl. 796.

<sup>30</sup> *Gokey v. Knapp*, 44 Iowa, 32; *Condit v. Baldwin*, 21 N. Y. 219, 78 Am. Dec. 137.

This is the general rule, but there are some cases contra. *Stephens v. Olson*, 62 Minn. 295, 64 N. W. 898. See *Mechem*, Ag. (2d Ed.) § 2002.

<sup>31</sup> *Revision N. J.* p. 519, § 5; *Broad v. Hoffman*, 6 Barb. (N. Y.) 177.

It has already been stated that pawnbrokers loaning their own money are not brokers at all, but are principals.<sup>32</sup>

## STOCK BROKERS

### 22. Stock brokers negotiate the purchase and sale of corporate stocks and bonds and government securities.

As already stated,<sup>33</sup> stock brokers, when selling stocks or bonds, are very much like factors, since they usually have possession of the property in which they deal. The business of stock brokers is very largely governed by the rules and usages of the stock exchange. The parties may, of course, govern their rights by any special contracts they see fit to make.<sup>34</sup> If no such agreement is made, the relation of the parties, when a customer orders his broker to buy stock in the expectation of a rise in the market, has been well stated by Hunt, C. J., in *Markham v. Jaudon*,<sup>35</sup> as follows: "The customer, Mr. M., employs the broker, Mr. J., to buy certain railroad stocks for his account, and to pay for them, and to hold them subject to his order as to the time of sale. The customer advances ten per cent. of their market value, and agrees to keep good such proportionate advance according to the fluctuations of the market. Waiving for the moment all disputed questions, I state the following as the result of this agreement: The broker undertakes and agrees (1) at once to buy for the customer the stocks indicated; (2) to advance all the money required for the purchase, beyond the ten per cent. furnished by the customer; (3) to carry or hold such stocks for the benefit of the customer so long as the margin of ten per cent. is kept good, or until notice is given by either party that the transaction must be closed; an appreciation in the value of the stocks is the gain of the customer, and not of the broker; (4) at all times to have in his name or under his control, ready for delivery, the shares purchased, or an equal amount of other shares of the same stock; (5) to deliver such shares to the customer when required by him, upon the receipt of the advances and commissions accruing to the broker; or (6) to sell such shares upon the order of the customer, upon payment of the like sums to him, and account to the customer for the proceeds of such sale. Under this contract, the customer undertakes (1) to pay a margin of ten per cent. on the current market value of the shares; (2) to keep good such margin,

<sup>32</sup> Ante, p. 190.

<sup>33</sup> Ante, p. 190.

<sup>34</sup> *Robinson v. Norris*, 6 Hun (N. Y.) 233; *Baker v. Drake*, 66 N. Y. 518, 23 Am. Rep. 80; *Hyatt v. Argenti*, 3 Cal. 151.

<sup>35</sup> 41 N. Y. 235, 239.



according to the fluctuations of the market;<sup>36</sup> (3) to take the shares so purchased on his order, whenever required by the broker, and to pay the difference between the percentage advanced by him and the amount paid therefor by the broker.<sup>37</sup> The position of the broker is twofold. Upon the order of the customer, he purchases the shares of stocks desired by him. This is a clear act of agency. To complete the purchase, he advances from his own funds, for the benefit of the customer, ninety per cent. of the purchase money." In making these advances, the broker assumes a new relation to the client; he becomes a creditor of the client, and holds the stock as a pledgee.<sup>38</sup>

When the customer desires to speculate on his judgment that the market will fall, he orders his broker to sell stocks or bonds which the principal does not own. The broker executes the order by borrowing the stock of some other broker for delivery to the purchaser. When the transaction is to be closed, the broker buys in stock on the market to replace that borrowed. An operation of this kind is called "selling short."<sup>39</sup> The broker is, of course, bound to follow the instructions of his principal in the execution of all orders for buying or sell-

<sup>36</sup> If he fails to do so, the broker may, after proper notice, sell the stock to protect himself. *Baker v. Drake*, 66 N. Y. 518, 23 Am. Rep. 80; *Gruman v. Smith*, 81 N. Y. 25; *Gillett v. Whiting*, 120 N. Y. 402, 24 N. E. 790; *Esser v. Linderman*, 71 Pa. 76.

<sup>37</sup> A broker who advanced margins for the purchase of stocks for his client could not recover the amount thereof before calling upon his client to take up the stock. *Muller v. Legendre*, 47 La. Ann. 1017, 17 South. 500. A broker is not entitled to recover from his principal differences on stock which he purports to carry over on his behalf, when there is no existing contract between such broker and any third party available for the principal at the time when such differences arise. *Skelton v. Wood*, 15 Reports, 130. Stock ordered of a broker on margin contracts belongs, not to the broker, but to customers, and may be redeemed by them from an assignee of the broker for the benefit of creditors. *Skiff v. Stoddard*, 63 Conn. 198, 26 Atl. 874, 21 L. R. A. 102.

<sup>38</sup> *Markham v. Jaudon*, 41 N. Y. 235; *Baker v. Drake*, 53 N. Y. 211, 13 Am. Rep. 507; *Id.*, 66 N. Y. 518, 23 Am. Rep. 80; *Stenton v. Jerome*, 54 N. Y. 480; *Gruman v. Smith*, 81 N. Y. 25; *Taussig v. Hart*, 58 N. Y. 425; *Gilpin v. Howell*, 5 Pa. 41, 45 Am. Dec. 720; *Child v. Hugg*, 41 Cal. 519; *Thompson v. Toland*, 48 Cal. 99; *Maryland Fire Ins. Co. v. Dalrymple*, 25 Md. 243, 89 Am. Dec. 779. For a discussion of the rights and liabilities of a stock broker so far as he is a pledgee, see *Hale, Bailm. & Carr. c. 4*. A broker is not bound to retain the identical certificates of stock, since one share is the exact equivalent of any other. It is sufficient if he always has on hand stock enough to fill his contract. *Caswell v. Putnam*, 120 N. Y. 153, 24 N. E. 287; *Taussig v. Hart*, *supra*; *Levy v. Loeb*, 85 N. Y. 365; *Atkins v. Gamble*, 42 Cal. 86, 10 Am. Rep. 282; *Hale, Bailm. & Carr. 159*.

<sup>39</sup> *Knowlton v. Fitch*, 52 N. Y. 288; *White v. Smith*, 54 N. Y. 522; *Rogers v. Wiley*, 131 N. Y. 527, 30 N. E. 582; *Hess v. Rau*, 95 N. Y. 359; *Maxton v. Gheen*, 75 Pa. 166; *Smith v. Bouvier*, 70 Pa. 325.

ing. If he fails to do so, he is liable to his principal for the resulting loss.<sup>40</sup> Where the broker is given a "stop order"—that is, an instruction to buy or sell when the market reaches a certain figure—he must wait for some other broker to make that price, and not make it himself by offering to buy or sell at that price.<sup>41</sup> Ordinarily, in stock transactions the brokers do not disclose their clients, but deal only with each other. The usual rules of liability apply, however, and a broker who discloses the name of his principal will not be liable on the contract he makes;<sup>42</sup> otherwise, he will.<sup>43</sup> One who has deposited margins with a broker, and ordered the purchase of stock, may withdraw the margins at any time before the order is executed, and revoke the broker's authority.<sup>44</sup>

## SHIP BROKERS

### 23. Ship brokers negotiate the purchase and sale of ships and the business of freighting vessels.<sup>45</sup>

Ship brokers engaged in the business of selling ships resemble in many respects real estate brokers.<sup>46</sup> A contract to pay a broker a

<sup>40</sup> *Smith v. Bouvier*, 70 Pa. 325; *Davis v. Gwynne*, 57 N. Y. 676; *Allen v. McConihe*, 124 N. Y. 342, 26 N. E. 812; *Galigher v. Jones*, 129 U. S. 193, 9 Sup. Ct. 335, 32 L. Ed. 658. Where a broker who had purchased securities for a customer on margins is directed, after the margin is exhausted, to sell, it is his duty to sell within a reasonable time thereafter, and, if he fails to do so, he is liable for the resulting loss. *Zimmerman v. Heil*, 86 Hun, 114, 33 N. Y. Supp. 391.

<sup>41</sup> *Porter v. Wormser*, 94 N. Y. 431; *Wicks v. Hatch*, 62 N. Y. 535; *Wornkow v. Clews*, 52 N. Y. Super. Ct. 176; *Hope v. Lawrence*, 50 Barb. (N. Y.) 258.

<sup>42</sup> *Coles v. Bristowe*, 4 Ch. App. 3.

<sup>43</sup> *Nickalls v. Merry*, L. R. 7 H. L. 530; *Royal Exch. Ins. Co. v. Moore*, 11 Wkly. Rep. 592; *Stray v. Russell*, 1 El. & El. 888.

<sup>44</sup> *Fletcher v. Marshall*, 15 Mees. & W. 761.

The New York theory is generally followed, but some cases have regarded the broker as an independent contractor, and neither an agent nor a pledgee. *Chase v. City of Boston*, 180 Mass. 458, 62 N. E. 1059.

That the broker may repledge the stock en bloc, see *Mayer v. Monzo*, 151 App. Div. 866, 137 N. Y. Supp. 616 (but see *Wood v. Fisk*, 215 N. Y. 233, 109 N. E. 177). *Contra*: *Sproul v. Sloan*, 241 Pa. 284, 88 Atl. 501, Ann. Cas. 1915B, 941.

<sup>45</sup> *Bouv. Law Dict.* tit. "Brokers."

<sup>46</sup> For a ship broker's right to commissions, see *Stillman v. Mitchell*, 2 Rob. (N. Y.) 523; *Howland v. Coffin*, 47 Barb. (N. Y.) 653; *Brown v. Post*, 6 Rob. (N. Y.) 111; *Cook v. Fiske*, 12 Gray (Mass.) 491; *Cook v. Welch*, 9 Allen (Mass.) 350; *Rennell v. Kimball*, 5 Allen (Mass.) 356. For the effect of the words "by telegraphic authority," used by a ship broker in signing a charter party, on his implied warranty of authority, see *Lilly v. Smales* [1892] 1 Q. B. 456.

specified commission for obtaining a charter of a vessel from the United States government is not void on the ground that it contravenes public policy.<sup>47</sup> The business of a ship broker includes the purchase and sale of ships, and the negotiation of contracts for building them,<sup>48</sup> as well as the soliciting of freight for the owner of the vessel, or the securing of a vessel to carry the goods of the shipper. Where a ship broker has negotiated a charter party, the loss of the vessel during the voyage will not deprive him of his commissions.<sup>49</sup>

## INSURANCE BROKERS

### 24. Insurance brokers negotiate contracts of insurance, generally as agents for the insured.

Persons who negotiate insurance on behalf of the insurer are more properly called "insurance agents." A broker who acts for the insured may, nevertheless, be the agent of the insurer for receiving the premiums.<sup>50</sup> But the broker has no authority to give the insured credit for his premiums,<sup>51</sup> unless the insurer is in the habit of giving the broker credit.<sup>52</sup> Being the agent of the insured, the broker's statements in making an application for a policy are binding on the insured, and, if false, will avoid the policy.<sup>53</sup> Where a broker has procured the insurance which he was instructed to negotiate, his authority to act for his principal, the insured, is at an end. He cannot surrender the policy for cancellation;<sup>54</sup> nor has he authority to receive

<sup>47</sup> *Howland v. Coffin*, 47 Barb. (N. Y.) 653.

<sup>48</sup> *Holmes v. Neafie*, 151 Pa. 392, 24 Atl. 1096.

<sup>49</sup> *Hagar v. Donaldson*, 154 Pa. 242, 25 Atl. 824.

<sup>50</sup> *How v. Union Mut. Life Ins. Co.*, 80 N. Y. 39; *Mayo v. Pew*, 101 Mass. 555; *Monitor Mut. Fire Ins. Co. v. Young*, 111 Mass. 537; *Crousillat v. Ball*, 3 Yeates (Pa.) 375, 2 Am. Dec. 375; *Hartford Fire Ins. Co. v. Reynolds*, 36 Mich. 502.

<sup>51</sup> *Hambleton v. Home Ins. Co.*, 6 Biss. 91, Fed. Cas. No. 5,972; *Marland v. Royal Ins. Co.*, 71 Pa. 393.

<sup>52</sup> *White v. Connecticut Fire Ins. Co.*, 120 Mass. 330; *Train v. Holland Purchase Ins. Co.*, 62 N. Y. 598; *Stebbins v. Lancashire Ins. Co.*, 60 N. H. 65; *Bang v. Farmville Ins. & Banking Co.*, 1 Hughes, 290, Fed. Cas. No. 838. Cf. *Gentry v. Connecticut Mut. Life Ins. Co.*, 15 Mo. App. 215.

<sup>53</sup> *Standard Oil Co. v. Triumph Ins. Co.*, 64 N. Y. 85; *Ben Franklin Ins. Co. v. Weary*, 4 Ill. App. 74; *McFarland v. Peabody Ins. Co.*, 6 W. Va. 425; *Hartford Fire Ins. Co. v. Reynolds*, 36 Mich. 502; *Mahon v. Royal Union Mut. Life Ins. Co.*, 134 Fed. 732, 67 C. C. A. 636.

<sup>54</sup> *Bennett v. City Ins. Co.*, 115 Mass. 241; *Van Valkenburgh v. Lenox Fire Ins. Co.*, 51 N. Y. 465; *Rothschild v. American Cent. Ins. Co.*, 5 Mo. App. 596; *Latoix v. Germania Ins. Co.*, 27 La. Ann. 113. But see *Goodson v. Brooke*, 4 Camp. 163; *Snyder v. Commercial Union Assur. Co.*, 67 N. J. Law, 7, 50 Atl. 509.

for the insured notices affecting the insurance,<sup>55</sup> unless he is regularly employed by the insured to attend to his insurance.<sup>56</sup>

The lien of an insurance broker has already been considered.<sup>57</sup> Such a broker is bound to procure insurance in reliable companies,<sup>58</sup> and to see that the policy is so drawn that it covers the risk intended to be insured against.<sup>59</sup>

An insurance broker may act under a *del credere* commission, and guaranty the solvency of the insurers with whom he takes out policies for his clients.<sup>60</sup>

## CUSTOM HOUSE BROKERS

### 25. Custom house brokers arrange the entry and clearance of ships, and the importation and exportation of merchandise.

Custom house brokers are defined by the United States statutes<sup>61</sup> as follows: "Every person whose occupation it is, as the agent of others, to arrange entries and other custom house papers, or transact business at any port of entry relating to the importation or exportation of goods, wares, or merchandise, shall be regarded a custom house broker." The term is also applied to agents authorized to attend to the entry and clearance of ships.<sup>62</sup>

<sup>55</sup> *White v. Connecticut Fire Ins. Co.*, 120 Mass. 330; *Hermann v. Niagara F. Ins. Co.*, 100 N. Y. 411, 3 N. E. 341, 53 Am. Rep. 197; *Grace v. American Cent. Ins. Co.*, 109 U. S. 278, 3 Sup. Ct. 207, 27 L. Ed. 932. See *Green v. Star Fire Ins. Co.*, 190 Mass. 586, 77 N. E. 649.

<sup>56</sup> *Standard Oil Co. v. Triumph Ins. Co.*, 64 N. Y. 85; *Tanenbaum v. Fed. Match Co.*, 189 N. Y. 75, 81 N. E. 565; *Insurance Co. of North America v. Wis. Cent. Ry. Co.*, 134 Fed. 794, 67 C. C. A. 300.

<sup>57</sup> *Ante*, p. 222. And see the following cases: *Spring v. South Carolina Ins. Co.*, 8 Wheat. 268, 5 L. Ed. 614; *Cranston v. Philadelphia Ins. Co.*, 5 Bin. (Pa.) 538; *Moody v. Webster*, 3 Pick. (Mass.) 424; *Sharp v. Whipple*, 1 Bosw. (N. Y.) 557; *Foster v. Hoyt*, 2 Johns. Cas. (N. Y.) 327.

<sup>58</sup> *Gettins v. Scudder*, 71 Ill. 86.

<sup>59</sup> *Park v. Hammond*, 6 Taunt. 495; *Moore v. Mourgue*, 2 Cowp. 479; *Mal-lough v. Barber*, 4 Camp. 150; *Maydew v. Forrester*, 5 Taunt. 615.

<sup>60</sup> *Grove v. Dubois*, 1 Term R. 112.

<sup>61</sup> Act July 13, 1866, c. 184, 14 Stat. 117.

<sup>62</sup> *Black, Law Dict. tit. "Custom-House Broker."*

# CONDITIONAL SALES AND CHATTEL MORTGAGES

## CONDITIONAL SALES

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## CONDITIONAL SALES

### 1. GENERAL CHARACTERISTICS

An agreement to sell personal property upon condition is **executory**, and no title passes from the seller to the purchaser until the condition is performed. The nature of the condition varies in different cases. Thus the following rules have been laid down:

“(1) That where, by the agreement, the vendor is to do anything to the goods before delivery, it is a condition precedent to the vesting of

the property. (2) That where anything remains to be done to the goods for ascertaining the price, such as weighing, testing, etc., this is a condition precedent to the transfer of the property." (3) That "the parties may indicate an intention, by their agreement, to make any condition precedent to the vesting of the property, and, if they do so, their intention is fulfilled." (4) "Where the buyer is, by the contract, bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer."<sup>1</sup>

In the first two classes above mentioned the sale is, in a sense, conditional, because the performance of some further act contemplated on the part of the seller must be performed before title can pass; but the third and fourth classes, relating more particularly to cases where the goods are already completed and ascertained, but where it is agreed that no title shall pass until some act is done by the purchaser—as, for example, payment—or to cases where some particular event must happen, or some particular condition be performed by either party, before title shall pass, cover what are usually described as conditional sales. Thus, in *Mires v. Solebay*<sup>2</sup> one Allston took sheep to pasture for a certain time, with an agreement that if, at the end of that time, he should pay a certain sum, he should have the sheep, and before the time expired the owner sold them to another person, and it was held that the sale was valid, and that the agreement to sell the sheep to Allston, if he would pay for them at a certain date, did not amount to a sale, but only to an agreement. So, also, where goods are sold to be paid for in cash or securities upon delivery, it is held that the sales are conditional only, and that the vendors are entitled to retake the goods, even after delivery, if the condition is not performed, the delivery being considered as conditional. This often happens in case of sales by auction, when certain terms of payment are prescribed with a condition that, if they are not complied with, the goods may be re-sold for account of the buyer, who is to account for any damage between the second sale and the first. Such was the case of *Lamond v. Davall*.<sup>3</sup> In *Crawcour v. Robertson*<sup>4</sup> certain furniture dealers let Robertson have a lot of furniture upon his paying £10 in cash, and signing an agreement to pay £5 per month (for which notes were given) until the whole price of the furniture should be paid, and when all the installments were paid, and not before, the furniture was to be the property of Robertson; but, if he failed to pay any of the install-

<sup>1</sup> Blackb. Sales, 152, and Benj. Sales, §§ 318, 320, quoted in *Harkness v. Russell & Co.*, 118 U. S. 667, 7 Sup. Ct. 51, 30 L. Ed. 285; *Bishop v. Shillito*, 2 Barn. & Ald. 329, note; *Brandt v. Bowlby*, 2 Barn. & Adol. 932.

<sup>2</sup> 2 Mod. 243.

<sup>3</sup> 9 Q. B. 1030.

<sup>4</sup> 9 Ch. Div. 419.

ments, the owners were authorized to take possession of the property, and all prior payments actually made were to be forfeited. The court of appeal held that the property did not pass by this agreement, and could not be taken as Robertson's property, by his trustee, under a liquidation proceeding. The same conclusion was reached in the subsequent case of *Crawcour v. Salter*.<sup>b</sup> In these cases, it is true, support of the transactions was sought from the custom, which prevailed in the places where the transactions took place, of hotel keepers holding their furniture on hire. But they show that the intent of the parties will be recognized and sanctioned where it is not contrary to the policy of the law. This policy, in England, is regulated by statute. It has long been a provision of the English bankruptcy laws, beginning with 21 Jac. I, c. 19, that if any person becoming bankrupt has in his possession, order, or disposition, by consent of the owner, any goods or chattels of which he is the reputed owner, or takes upon himself the sale, alteration, or disposition thereof as owner, such goods are to be sold for the benefit of his creditors. This law has had the effect of preventing or defeating conditional sales accompanied by voluntary delivery of possession, except in cases like those above referred to; so that very few decisions are to be found in the English books directly in point on the question under consideration.<sup>c</sup>

This presumption of property in a bankrupt, arising from his possession and reputed ownership, became so deeply imbedded in the English law that in the process of time many persons in the profession were led to regard it as a general doctrine of the common law, and hence in some states in this country, where no such statute exists, the principles of the statute have been followed, and ordinary conditional sales have been condemned either as being fraudulent and void, as against creditors, or as amounting in effect to absolute sales with a reserved lien or mortgage to secure the payment of the purchase money; this being based on the notion that such sales are not allowed by law, and that the intent of the parties, however formed, cannot legally be carried out. The insufficiency of this argument is demonstrated by the fact that conditional sales are admissible in several acknowledged cases, and therefore there cannot be any rule of law against them as such. They may sometimes be used as a cover for fraud, and, when this is charged, all the circumstances of the case will be open for the consideration of the jury. Where no fraud is intended, but the purpose of the parties is that the vendee shall not have the title to the goods until he has paid for them, there is no general principle of law to prevent them from having effect. In this

<sup>a</sup> 18 Ch. Div. 30.

<sup>b</sup> *Harkness v. Russell & Co.*, 118 U. S. 663, 669, 7 Sup. Ct. 51, 30 L. Ed. 285; *Horn v. Baker*, 9 East, 215; *Holroyd v. Gwynne*, 2 Taunt. 176.

country, in states where no such statute as the English statute referred to is in force, many decisions have been rendered sustaining conditional sales accompanied by delivery of possession, both as between the parties themselves and as to third persons.<sup>7</sup>

In *Herring v. Hoppock* \* the same doctrine was followed. In that case there was an agreement in writing for the sale of an iron safe, which was delivered to the vendee, and a note at six months given therefor, but it was expressly understood that no title was to pass until the note was paid, and, if not paid, the vendor was authorized to retake the safe, and collect all reasonable charges for its use. The sheriff levied on the safe as property of the vendee, with notice of the plaintiff's claim. The court of appeals held that the title did not pass out of the vendor. Paige, J., said: "Whenever there is a condition precedent attached to a contract of sale, which is not waived by an absolute and unconditional delivery, no title passes to the vendee until he performs the condition or the seller waives it." And upon breach the seller may retake the property.<sup>8</sup>

## 2. BONA FIDE PURCHASER FROM VENDEE

In *Smith v. Lynes* <sup>10</sup> and *Wait v. Green* <sup>11</sup> it was held that a bona fide purchaser, without notice, from the vendee, who is in possession under a conditional sale, will be protected as against the original vendor. But these cases were subsequently overruled in *Ballard v. Burgett*,<sup>12</sup> *Cole v. Mann*,<sup>13</sup> and *Bean v. Edge*.<sup>14</sup>

<sup>7</sup> *Harkness v. Russell & Co.*, 118 U. S. 663, 670, 7 Sup. Ct. 51, 30 L. Ed. 285; *Warren v. Liddell*, 110 Ala. 232, 244, 20 South. 89; *Hussey v. Thornton*, 4 Mass. 405, 3 Am. Dec. 224; *Wentworth v. S. A. Woods Mach. Co.*, 163 Mass. 28, 39 N. E. 414; *Marston v. Baldwin*, 17 Mass. 606; *Barrett v. Pritchard*, 2 Pick. (Mass.) 512, 515, 13 Am. Dec. 449; *Coggill v. Hartford & N. H. R. Co.*, 3 Gray (Mass.) 545; *Chase v. Ingalls*, 122 Mass. 381; *Forbes v. Marsh*, 15 Conn. 384; *Hart v. Carpenter*, 24 Conn. 427; *Haggerty v. Palmer*, 6 Johns. Ch. (N. Y.) 437; *Strong v. Taylor*, 2 Hill (N. Y.) 326.

<sup>8</sup> 15 N. Y. 409.

<sup>9</sup> *Iserman v. Conklin*, 21 Misc. Rep. 194, 47 N. Y. Supp. 107; *Bailey v. Baker Ice Mach. Co.*, 239 U. S. 268, 36 Sup. Ct. 50, 60 L. Ed. 275; *In re Stoughton Wagon Co.*, 231 Fed. 676, 145 C. C. A. 562; *Ratchford v. Cayuga County Cold Storage & Warehouse Co.*, 159 App. Div. 525, 145 N. Y. Supp. 83, affirmed 217 N. Y. 565, 112 N. E. 447, L. R. A. 1916E, 615; *Nelson v. Gibson*, 143 App. Div. 894, 129 N. Y. Supp. 702.

<sup>10</sup> 5 N. Y. 41.

<sup>11</sup> 35 Barb. (N. Y.) 585, 36 N. Y. 556.

<sup>12</sup> 40 N. Y. 314.

<sup>13</sup> 62 N. Y. 1.

<sup>14</sup> 84 N. Y. 510.

Compare *Dows v. Kidder*, 84 N. Y. 121; *Parker v. Baxter*, 86 N. Y. 586, and *Farwell v. Importers' & Traders' Nat. Bank*, 90 N. Y. 483, which are dis-



In Thomas, Chat. Mortg. § 63, it is said that the controlling test in this respect is found in the distinction between a conditional sale of chattels and a conditional delivery upon a sale. "That is to say, we are to examine as to whether the sale itself has been upon the condition, or whether the sale is absolute, and the condition only affects the right of the vendee to immediate possession. The question in each case will be as to whether the contract of sale is or is not complete. If it is an executed sale, the obligation of the buyer to pay is absolute, and the property is at his risk. If it is destroyed or lost, the obligation to pay will not be discharged, notwithstanding that, as between the vendor and the vendee, the title has not passed. As a security for the vendor, it may be stipulated that the delivery shall not carry the title; and this agreement will so fully protect the vendor, while there are no intervening rights, that the distinction now being made will not then be important; but after actual delivery, although as between the parties to the sale such delivery be conditional, a bona fide purchaser from the vendee obtains a perfect title, though a voluntary assignee of the purchaser does not. But where a contract is for a sale in the future, and the delivery amounts to a mere bailment, and the sale is on the condition that certain payments are made, so that the property, while in the hands of the so-called 'vendee,' is at the risk of the vendor, then the intended vendee has no title to the property, and can convey none, even to a bona fide purchaser."<sup>15</sup>

In 1884, however, a statute was passed in New York, which is now found embodied in the so-called "Lien Law,"<sup>16</sup> providing that, "except as otherwise provided in this article, conditions and reservations in a contract for the conditional sale of goods and chattels, accompanied by immediate delivery and a continued possession of the thing contracted to be sold, to the effect that the ownership of such goods and chattels is to remain in the conditional vendor, or in a person other than the conditional vendee, until they are paid for, or until the occurrence of a future event or contingency, shall be void as against subsequent purchasers, pledgees, or mortgagees, in good faith; and as to them the sale shall be deemed absolute, unless such contract of sale

cussed in *Harkness v. Russell & Co.*, 118 U. S. 663, 675, 7 Sup. Ct. 51, 30 L. Ed. 285.

<sup>15</sup> Thomas, Chat. Mortg. § 63, citing numerous cases, and also articles upon the title of "Bona Fide Purchasers" in 24 Alb. Law J. 185, 226, 264, 280, 343, 363.

<sup>16</sup> Laws 1897, c. 418, § 112; Personal Property Law (Consol. Laws, c. 41) § 62.

An amendment in 1904 (Laws 1904, c. 698) requires filing, though the goods are to be manufactured or delivered long after the execution of the contract. See, for prior law, *Graves Elevator Co. v. Callanan*, 11 App. Div. 301, 42 N. Y. Supp. 930.

containing such conditions and reservations, or a true copy thereof, be filed as directed in this article." In nearly all of the states the title of the vendor, subject in some states to statutes similar to that just quoted,<sup>17</sup> has been sustained, not only as to the creditors of the bankrupt, but also as to bona fide purchasers from him.<sup>18</sup> In many states the subject is now regulated by statutes, some of which require filing of the agreement, while others declare that no agreement that personal property delivered to another shall remain the property of the vendor shall be valid against third persons without notice.<sup>19</sup>

### 3. RULE IN THE FEDERAL COURTS

The liability of property to be sold under legal process issuing from the courts of the state where it is situated must be determined by the law there, rather than that of the jurisdiction where the owner lives. These decisions rest on the ground that every state has the right to regulate the transfer of property within its limits, and that whoever sends property to it impliedly submits to the regulations concerning its transfer in force there, although a different rule of transfer prevails in the jurisdiction where he resides.<sup>20</sup>

### 4. AFFIRMANCE OF SALE BY SELLER

When chattels are sold upon condition that title shall not pass from the vendor to the vendee until the agreed price is paid, the vendor may waive the right to retake the chattels on default, and recognize

<sup>17</sup> *Wright v. Barnard*, 89 Iowa, 166, 56 N. W. 424; *Knowles Loom Works v. Vacher*, 57 N. J. Law, 490, 31 Atl. 306, 33 L. R. A. 305.

<sup>18</sup> *Warren v. Liddell*, 110 Ala. 232, 244, 20 South. 89; *Wentworth v. S. A. Woods Mach. Co.*, 163 Mass. 28, 39 N. E. 414; *Thomas, Chat. Mortg.* § 58. See *Leatherberry v. Connor*, 54 N. J. Law, 172, 23 Atl. 684, 39 Am. St. Rep. 672. Contra: *Ryle v. Knowles Loom Works*, 31 C. C. A. 340, 87 Fed. 976; *Union Bank of Wilton v. Creamery Package Mfg. Co.*, 105 Iowa, 136, 74 N. W. 921.

<sup>19</sup> *Call v. Seymour*, 40 Ohio St. 670; *Ryle v. Knowles Loom Works*, 31 C. C. A. 340, 87 Fed. 976; *Marquette Mfg. Co. v. Jeffrey*, 49 Mich. 283, 13 N. W. 592; *Harkness v. Russell & Co.*, 118 U. S. 663, 675, 7 Sup. Ct. 51, 30 L. Ed. 285; *George v. Stubbs*, 26 Me. 243; *Sargent v. Allen*, 8 N. H. 325; *Hefflin v. Bell*, 30 Vt. 134; *Thorpe v. Fowler*, 57 Iowa, 541, 11 N. W. 3; *Cole v. Berry*, 42 N. J. Law, 308, 36 Am. Rep. 511. See, also, Mr. Freeman's note to *Kanaga v. Taylor*, 7 Ohio St. 134, in 70 Am. Dec. 62; and compare *Haak v. Linderman*, 64 Pa. 499, 3 Am. Rep. 612; *Van Duzor v. Allen*, 90 Ill. 499; *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664, 671, 23 L. Ed. 1003.

<sup>20</sup> *Green v. Van Buskirk*, 5 Wall. 307, 18 L. Ed. 599; *Id.*, 7 Wall. 139, 19 L. Ed. 109; *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664, 23 L. Ed. 1003; *Potter Mfg. Co. v. Arthur*, 220 Fed. 843, 136 C. C. A. 589, Ann. Cas. 1916A, 1268.

title in the vendee.<sup>21</sup> If, in affirmance of the contract, the vendor seizes the chattels for the avowed purpose of selling them, and collecting the amount due upon the contract, he has no right to seize and sell or seize and retain more than is sufficient to satisfy his demand and expenses.<sup>22</sup>

The fact that the vendor recovers against the conditional vendee a judgment for so much of the purchase price as has not been paid by the vendee, after the latter has taken possession under the conditional agreement, does not impair the vendor's title, and the vendee still has no leviable interest in the property until the purchase money is fully paid.<sup>23</sup>

## 5. SALE BY BAILEE FOR HIRE

Where the owner of personal property delivers it to a bailee for hire, under an agreement that the latter may purchase it, the latter, prior to the performance of the condition, cannot give title to a purchaser in good faith, for value, and without notice.<sup>24</sup>

The transaction is merely a bailment.<sup>25</sup> If, however, the bailment is

<sup>21</sup> *Detroit Heating & Lighting Co. v. Stevens*, 16' Utah, 177, 52 Pac. 379; *Hervey v. Dimond*, 67 N. H. 342, 39 Atl. 331, 68 Am. St. Rep. 673; *Potter Printing Press Co. v. Schreiner*, 47 App. Div. 530, 62 N. Y. Supp. 492.

<sup>22</sup> *O'Rourke v. Hadcock*, 114 N. Y. 541, 549, 22 N. E. 33. See, also, section 116 of the New York Lien Law (Laws 1897, c. 418), now Personal Property Law (Consol. Laws, c. 41) § 65, providing that, in case of a retaking by the vendor or a successor in interest, the goods shall be retained for a period of 30 days, during which the vendee or his successor in interest may comply with the terms of the contract, and thereupon receive the property, and that after the expiration of that period, if the terms are not complied with, the articles may be sold at public auction on notice, in which case the vendor or his successor in interest may retain from the proceeds the amount due on his contract and the expenses of storage and of sale; the balance to be held subject to the demand of the vendee or his successor in interest for 30 days, and then deposited with the treasurer, chamberlain, or supervisor, who shall hold it for the vendee or his successor in interest for five years, and, if unclaimed, shall transfer it to the funds of the town, village, or city. Similar provisions exist in many states. *Orner v. Sattley Mfg. Co.*, 18 Ind. App. 122, 47 N. E. 644; *Richardson Drug Co. v. Teasdall*, 52 Neb. 698, 72 N. W. 1028; *Milburn Mfg. Co. v. Wayland* (Tenn. Ch. App.) 43 S. W. 129.

<sup>23</sup> *National Cash-Register Co. v. Coleman*, 85 Hun, 125, 32 N. Y. Supp. 593; *Campbell Printing Press & Mfg. Co. v. Rockaway Pub. Co.*, 56 N. J. Law, 676, 29 Atl. 681, 44 Am. St. Rep. 410; *Clark v. B. B. Richards Lumber Co.*, 72 Minn. 397, 75 N. W. 605; *Ratchford v. Cayuga County Cold Storage & Warehouse Co.*, 217 N. Y. 565, 112 N. E. 447, L. R. A. 1916E, 615.

<sup>24</sup> *Austin v. Dye*, 46 N. Y. 500; *Ryle v. Knowles Loom Works*, 31 C. C. A. 340, 87 Fed. 976.

<sup>25</sup> *Neidig v. Eifer*, 18 Abb. Prac. (N. Y.) 353; *Walton v. Tepel*, 210 Fed. 161, 127 C. C. A. 11; *Kingman Plow Co. v. Joyce*, 194 Mo. App. 367, 184 S. W. 490.

coupled with an agreement by which the bailee is bound to buy, the transaction will be deemed a conditional sale.<sup>26</sup>

## 6. FRAUD ON CREDITORS

A contract of conditional sale, which states that, whereas, the party of the first part is a baker without money to purchase flour and is anxious to have the second party assist him, so that he may bake and make a living, the second party agrees to deliver flour from time to time as may be needed by the first party, the title to remain in the vendor until the price is paid, and that, should the baker "desire" to use any of the flour in his business, he shall notify the vendor and shall immediately at his earliest convenience pay for the flour intended to be used, and thereupon the title thereto shall pass to the first party, is fraudulent upon its face.<sup>27</sup> The fact that the conditional vendee of goods is permitted by the agreement to sell the articles embraced therein upon condition that the proceeds of sales shall be accounted for and paid to the vendor to apply upon the purchase price, does not impair the rights of the vendor, or render it void as to the creditors of the vendee.<sup>28</sup> The same principle applies where there is a delivery under an agreement for conditional sale, with a right in the purchaser to sell, and remit the proceeds.<sup>29</sup> But if the conditional vendee is given absolute power to sell for his own benefit or to consume the property, the result is to vest title in the purchaser as against his creditors.<sup>30</sup>

## 7. FORM OF CONDITIONAL SALE

The mere nominal form of a transaction is not conclusive in determining whether it is or is not a conditional sale. The law looks at its real nature. Thus, a transaction in form a lease, or bailment, or absolute sale may be in fact a conditional sale if the intent is to make an agreement of sale conditional upon the happening of a contingency or the performance of a condition.<sup>31</sup>

<sup>26</sup> *Morgan-Gardner Electric Co. v. Brown*, 193 Pa. 351, 44 Atl. 459; *Tarr v. Stearman*, 185 Ill. App. 45; *Kingman Plow Co. v. Joyce*, supra.

<sup>27</sup> *Scherl v. Flam*, 129 App. Div. 561, 114 N. Y. Supp. 86.

<sup>28</sup> *Prentiss Tool & Supply Co. v. Schirmer*, 136 N. Y. 305, 32 N. E. 849, 32 Am. St. Rep. 737; *Mansur & Tebbetts Implement Co. v. Beeman-St. Clair Co.* (Tex. Civ. App.) 45 S. W. 729.

<sup>29</sup> *Cole v. Mann*, 62 N. Y. 1; *Ufford v. Winchester*, 69 Vt. 542, 38 Atl. 239.

<sup>30</sup> *Devlin v. O'Neill*, 6 Daly (N. Y.) 305; *Frank v. Batten*, 49 Hun, 91, 1 N. Y. Supp. 705.

<sup>31</sup> *Wright v. Barnard*, 89 Iowa, 166, 56 N. W. 424; *Singer Sewing-Mach. Co. v. Holcomb*, 40 Iowa, 33; *Farquhar v. McAlevy*, 142 Pa. 233, 21 Atl. 811, 24

## 8. SPECIAL STATUTORY PROVISIONS

In addition to the provisions already referred to, the New York statute, which may be taken as typifying in general the statutes of other states, although the latter vary from it and among themselves in many respects, contains the following provisions:

### *Definitions*

"The term 'conditional vendor,' when used in this article, means the person contracting to sell goods and chattels upon condition that the ownership thereof is to remain in such person until such goods and chattels are fully paid for or until the occurrence of any future event or contingency; the term 'conditional vendee,' when so used, means the person to whom such goods and chattels are so sold."<sup>32</sup>

### *Filing*

The same statute, after providing that conditions and reservations in a contract for conditional sale accompanied by immediate delivery and continued possession of the thing contracted to be sold, to the effect that the ownership of such goods and chattels is to remain in the vendor until payment, or some future event, shall be void as against subsequent purchasers, pledgees, or mortgagees in good faith, and as to them the sale shall be deemed absolute, unless such contract of sale, or a true copy thereof, shall be filed, as there provided.<sup>33</sup> The law goes on to provide in section 64 that the provisions of the lien law relating to chattel mortgages apply to the indorsement, entry, refileing, and discharge of contracts for the conditional sale of goods and chattels. Upon this subject, therefore, reference is here made to the subject of filing of chattel mortgages, which is discussed hereafter.<sup>34</sup>

## 9. SALE WITH OPTION TO RETURN

Where an owner of property sells it subject to the condition that the purchaser may, at his option, return it, the seller is thereby divested of all title and control over the goods, unless the seller elects to

Am. St. Rep. 497; *Ryle v. Loom Works*, 31 C. C. A. 340, 87 Fed. 976; *Corbett v. Riddle*, 209 Fed. 811, 126 C. C. A. 535.

<sup>32</sup> Personal Property Law (Consol. Laws, c. 41) § 60.

<sup>33</sup> Id. §§ 62, 63.

<sup>34</sup> See, also, *Wright v. Barnard*, 89 Iowa, 166, 56 N. W. 424; *Knowles Loom Works v. Vacher*, 57 N. J. Law, 490, 31 Atl. 306, 33 L. R. A. 305; *In re Wilcox & Howe Co.*, 70 Conn. 220, 39 Atl. 163; *Cohen v. Schneider*, 70 Conn. 505, 40 Atl. 455; *Holland v. Adams*, 103 Ga. 610, 30 S. E. 432; *Johnston v. Wood*, 19 Wash. 441, 53 Pac. 707; *Woolley v. Geneva Wagon Co.*, 59 N. J. Law, 278, 35 Atl. 789. See *Griffin & Curtis, Chat. Mortgs. and Cond. Sales*, c. XVII.

return them; for until the exercise of this option the goods are his; he has the *jus disponendi*, and is at liberty to sell upon his own terms, and to whom he pleases, the only consequence being that he is to pay the seller the agreed price, and to this extent becomes the seller's debtor.<sup>35</sup> In this respect such a sale differs radically from a conditional sale, properly so called, for here the title passes subject to a condition subsequent, while in a proper conditional sale the title does not pass until the performance of a condition precedent thereto.<sup>36</sup>

## CHATTEL MORTGAGES

### 10. CHATTEL MORTGAGE DEFINED

A chattel mortgage is a present transfer of the title to personal property, subject to defeat by payment of the sum or instrument it is given to secure; and, in default of performance by the mortgagor of the condition, the title of the mortgagee becomes absolute.<sup>37</sup> "A chattel mortgage is a transfer of personal property as security for a debt or obligation, in such form that, upon failure by the mortgagor to comply with the terms of the contract, the title of the property will be in the mortgagee."<sup>38</sup>

### 11. CHATTEL MORTGAGE AND CONDITIONAL SALE DISTINGUISHED

The owner of personal property may sell the same outright, subject to no condition. This is an absolute sale. Instead of this, he may agree to sell it upon a condition to be performed by the purchaser. This is a conditional sale. Or, again, he may make an absolute sale, and take back from the purchaser a chattel mortgage upon it, by virtue of which, upon the failure of the purchaser to perform something which he agrees to do, the title to the property will again become vested in the original owner. Or, still again, he may keep the property, and himself give a mortgage upon it, in which case, upon his failure to perform some agreement on his part, the title shall vest in the mort-

<sup>35</sup> *Costello v. Herbst*, 18 Misc. Rep. 176, 41 N. Y. Supp. 574.

<sup>36</sup> *Fish v. Benedict*, 74 N. Y. 613; *Carter v. Wallace*, 32 Hun (N. Y.) 384; *Ex parte White*, 6 Ch. App. 397.

<sup>37</sup> *Parshall v. Eggert*, 54 N. Y. 18; *Blake v. Corbett*, 120 N. Y. 327, 24 N. E. 477.

<sup>38</sup> *Thomas, Chat. Mortg.* § 2.

gagee. The second and third of these cases present some points of similarity, but in other respects are different. In the case of a conditional sale, the title continues in the original owner, and is divested only upon the happening of the specified condition. In the case of a sale, the seller parts with the title, and, if he takes back a mortgage, he thereby reacquires a mere technical title, and does not reacquire absolute title, except in case of nonperformance by the purchaser. But in both cases the result of the transaction is to give to the purchaser certain rights in respect to the property, and to leave certain other rights in respect to it in the seller. If one who owns property wishes, for example, to dispose of it, but the proposed purchaser is not at present in a position to pay the price, and the seller is willing to deliver the property and wait for payment, if only he can assure himself of ultimately having either the property or the price, without relying merely upon the purchaser's promise to pay, he may either deliver it to the purchaser under an agreement that the title should not pass until the price is paid, or he may sell and deliver it, and take back a chattel mortgage upon it, containing the condition that, if the stipulated sum should be paid by a specified date, the mortgage shall be void; otherwise to remain in full force and effect. In the former case, if payment was not made, a seller would be in the same position as if he had not agreed to sell; while in the latter, if the amount named in the mortgage was not paid, he would again own the property. As between these two forms of the transaction, a distinction sometimes exists under the statutes relating to the necessity of filing either chattel mortgages, or conditional bills of sale, or both.<sup>39</sup>

## 12. MORTGAGE, PLEDGE, AND SALE DISTINGUISHED

In the case of an absolute sale, the title passes to the purchaser, subject to no condition. A conditional sale may, as already seen, be conditioned upon the doing of some act to the property by the vendor before the transaction is completed, as weighing or separating it from other property; or it may be conditional, even though ready for delivery, and even though delivered, if the agreement is that title is not to pass until the performance of some condition by the vendee or the happening of some subsequent contingency. In all these cases, title does not pass until the condition is complied with, or the contingency happens. In the case of a chattel mortgage, the title passes, theoretically; but no delivery is necessary to consummate the transaction, and usually the mortgaged goods are not in fact delivered. As already seen, the mortgagor retains some of the rights incident to ownership;

<sup>39</sup> *Harkness v. Russell & Co.*, 118 U. S. 663, 7 Sup. Ct. 51, 30 L. Ed. 285.

such as the right to sell, or to place a second mortgage on the property subject to the first mortgage, until default, at which time the absolute legal title passes to the mortgagee, subject to an equitable right in the mortgagor to redeem. In the case of a pledge, the delivery of the property to the pledgee is essential.<sup>40</sup>

### 13. MORTGAGE, CONDITIONAL SALE, AND BAILMENT DISTINGUISHED

“When the identical thing delivered, although in an altered form, is to be restored, the contract is one of bailment, and the title to the property is not changed; but when there is no obligation to restore the specific article, and the receiver is at liberty to return another thing of equal value, he becomes a debtor to make the return, and the title to the property is changed; it is a sale,” absolute or conditional, according to the circumstances.<sup>41</sup>

### 14. FORM OF CHATTEL MORTGAGE

A chattel mortgage is usually in the form of a transfer of the property to the mortgagee, his executors, administrators, and assigns, specifying the goods mortgaged, upon condition, nevertheless, that if the mortgagor, his heirs, executors, administrators, and assigns, shall and do well and truly pay, or cause to be paid, to the mortgagee, his executors, administrators, and assigns, a specified sum of money, or the amount of specified obligations, then and in that event the mortgage to be void, otherwise to remain in full force and effect. It commonly provides, also, that the mortgagor shall insure the goods and chattels mortgaged, and keep them insured, against loss and damage by fire, in a company to be approved by the mortgagee, with the loss, if any, payable to the mortgagee, as his interest may appear; and the mortgage also usually contains special provisions against the removal of the property by the mortgagor without the mortgagee's consent, and for the retention by the mortgagor of the property mortgaged, until default, and for the taking of the property by the mortgagee in case the mortgagor sells or assigns the same, and for a sale thereof, and the retention out of the proceeds of the amount then unpaid, with the costs and charges of removing and selling the property. But no particular

<sup>40</sup> *Siedenbach v. Riley*, 111 N. Y. 560, 19 N. E. 275; *People v. Kirkpatrick*, 69 Ill. App. 207; *Ward v. Lord*, 100 Ga. 407, 28 S. E. 446; *Canfield v. W. J. Gould & Co.*, 115 Mich. 461, 73 N. W. 550; *Anglin v. Barlow* (Tex. Civ. App.) 45 S. W. 827.

<sup>41</sup> *Wright v. Barnard*, 89 Iowa, 166, 56 N. W. 424; *Foster v. Pettibone*, 7



form is essential.<sup>42</sup> It need not, for example, state the sum of money for which it is given as security, nor that the mortgagee shall have the right to take possession of the goods. Thus, the following instrument has been held to be a chattel mortgage: "For value received, I, Isabella Corbett, do hereby sell and assign the above mentioned and described books to Henry A. Blake, his heirs and assigns, I do hold and retain possession of said books for eight months from this sale; and if, during that period, the sum of indebtedness to said Blake now owing to him by Richard Crowley is paid or satisfied, for the payment of which this assignment is made as security, then this conveyance shall be null and void."<sup>43</sup>

So, where an instrument which was in form an absolute bill of sale contained a provision that "it is further understood and agreed by the parties hereto that, if the said party of the first part pay unto the party of the second part the sum of \$400, within ——— from the date hereof, the party of the second part agrees and will resell the property mentioned herein, back to the said party of the first part, and it is further understood and agreed by the parties hereto that the property mentioned herein and specified in the schedule shall remain in the possession of the party of the first part, he agreeing to pay the party of the second part \$2.50 per week for the use of said mentioned property in his business"; and it appeared that the owner of the property had applied for a loan of money, offering to secure its repayment by giving a chattel mortgage; that the lender had refused to accept a chattel mortgage, but had accepted the instrument in question instead; and that he had acknowledged that the instrument was to be given back when the money should be repaid to him—it was held that these facts, taken in connection with the provisions of the instrument, contemplated a loan of money and a sale of the property, upon the condition that the property should be returned upon the payment of the money so loaned, and that this was, in effect, a chattel mortgage.<sup>44</sup>

N. Y. 435, 57 Am. Dec. 530; *Chickering v. Bastress*, 130 Ill. 206, 22 N. E. 542, 17 Am. St. Rep. 309; *Mowbray v. Cady*, 40 Iowa, 604; *Budlong v. Cottrell*, 64 Iowa, 235, 20 N. W. 166.

<sup>42</sup> *Gilbert v. National Cash Register Co.*, 67 Ill. App. 606; *Smith-McCord Dry-Goods Co. v. John B. Farwell Co.*, 6 Okl. 318, 50 Pac. 149; *Raphael v. Mullen*, 171 Mass. 111, 50 N. E. 515.

<sup>43</sup> *Blake v. Corbett*, 120 N. Y. 327, 24 N. E. 477.

<sup>44</sup> *Susman v. Whyard*, 149 N. Y. 127, 43 N. E. 413. As to what is a sufficient description for the mortgage to contain of the chattels mortgaged, see *Williamson v. Wylie*, 69 Mo. App. 368; *Wilson v. Rustad*, 7 N. D. 330, 75 N. W. 260, 66 Am. St. Rep. 649; *Desany v. Thorp*, 70 Vt. 31, 39 Atl. 309; *Cragin v. Dickey*, 113 Ala. 310, 21 South. 55.

So an absolute bill of sale, or any form of contract, may be a mortgage, if intended merely as security. *Griffin & Curtis, Chat. Mortgs. and Cond. Sales*, § 3.

## 15. EFFECT ON THE TITLE BEFORE DEFAULT

While, strictly speaking, upon the execution of a chattel mortgage, a conditional legal title to the property is vested in the mortgagee, which title is subject to defeasance by the performance of the conditions contained in the mortgage, and title vests at law in the mortgagee, upon default in the payment of the mortgage, and thereafter there is left in the mortgagor only an equity of redemption, this view is more technical and theoretical than practical. Practically, the substantial title remains in the mortgagor, with all the incidents of the legal title. He retains the use, control, and benefit of the property, subject to the mortgage. If the property is taken from his possession wrongfully during the time when, by the terms of the mortgage, he is entitled to retain possession thereof, he may maintain an action for conversion against any wrongdoer, even against the mortgagee. He can sell it, and convey a good title, subject to the mortgage, to any purchaser; and it may be seized and sold by virtue of an execution against him.<sup>45</sup> The mortgagor can sell the property, or mortgage it; and a subsequent mortgage of personal property is not an uncommon form of security.<sup>46</sup>

## 16. EFFECT ON TITLE AFTER DEFAULT

After default in the payment of the mortgage, whatever title the mortgagor had is vested absolutely, subject to the right of redemption in equity, in the mortgagee;<sup>47</sup> and thereafter the mortgagee, even though his mortgage is a second mortgage, has the same right to sue for a conversion of the property, or an injury to it, as the mortgagor would have possessed if there had been no default in the payment. This is the result where the first mortgage is not yet overdue; but, when the title of the first mortgage has become absolute at law, the second mortgagee cannot thereafter sue for conversion.<sup>48</sup>

When default is made in the payment of the debt secured by a mortgage on personal property, the legal title to the property becomes vested in the mortgagee; and thereafter the mortgagor or any one

<sup>45</sup> *Leadbetter v. Leadbetter*, 125 N. Y. 290, 26 N. E. 265, 21 Am. St. Rep. 738; *Casserly v. Witherbee*, 119 N. Y. 522, 23 N. E. 1000.

<sup>46</sup> *Moore v. Prentiss Tool & Supply Co.*, 133 N. Y. 144, 149, 30 N. E. 736.

<sup>47</sup> *Martin v. Jenkins*, 51 S. C. 42, 27 S. E. 947; *Trustees of Ashland Lodge*, No. 63, I. O. O. F., v. *Williams*, 100 Wis. 223, 75 N. W. 954, 69 Am. St. Rep. 912.

<sup>48</sup> *Moore v. Prentiss Tool & Supply Co.*, 133 N. Y. 144, 30 N. E. 736; *Treat v. Gilmore*, 49 Me. 34; *Ring v. Neale*, 114 Mass. 111, 19 Am. Rep. 316.

holding his title has but an equitable right of redemption, and he can accordingly transfer no greater right to his assignee.<sup>49</sup>

Where default has been made in the payment of a first mortgage before the second is executed, and in the second before the third is executed, the last two mortgages transfer nothing but the equity of redemption, because the legal title has become vested in the first mortgagee, who could at any time assert that title by taking the property into his possession. But while the holder of a first mortgage, after default in payment of his debt, becomes vested with the legal title, yet, so long as he does not take possession, he does not acquire all the rights nor subject himself to all the duties and responsibilities of owner. So long as the possession of the mortgagor is not disturbed, the mortgagor is entitled to receive the earnings of the property, if any, and is liable for repairs, and for the discharge of the duties and obligations incident to ownership; and the mortgagee, though having the legal title after default, is not charged with any such obligations, in the absence of express contract, until he assumes them by taking possession, and then he becomes entitled to receive the earnings of the property, if any.<sup>50</sup>

If a mortgagee holding a mortgage upon several chattels continues to sell after he has realized enough to satisfy the debt and costs, he becomes a trespasser.<sup>51</sup>

## 17. CHATTEL MORTGAGE ON NONEXISTENT PROPERTY

A mortgage cannot be given effect at law as a lien upon personal property which, at the time of its delivery, was not in existence, either actually or potentially, when the rights of creditors intervene. At law, such a mortgage must be conceded to be void. The mortgage could have no positive operation to transfer in *præsenti* property not in *esse*. But it may operate by way of a personal contract between the parties that the creditor should have a lien upon the property to be subsequently acquired by his debtor, which equity will enforce as against the latter.<sup>52</sup>

<sup>49</sup> *Kimball v. Farmers' & Mechanics' Nat. Bank of Buffalo*, 138 N. Y. 500, 504, 34 N. E. 337, 20 L. R. A. 497.

<sup>50</sup> *Kimball v. Farmers' & Mechanics' Nat. Bank of Buffalo*, 138 N. Y. 500, 505, 34 N. E. 337, 20 L. R. A. 497; *Wilson v. Wilson*, L. R. 14 Eq. 40; *Brown v. Tanner*, 3 Ch. App. 597; *Liverpool Marine Credit Co. v. Wilson*, 7 Ch. App. 507.

<sup>51</sup> *O'Rourke v. Hadcock*, 114 N. Y. 541, 549, 22 N. E. 33.

<sup>52</sup> *Rochester Distilling Co. v. Rasey*, 142 N. Y. 570, 37 N. E. 632, 40 Am. St. Rep. 635; *Bank of Lansingburgh v. Crary*, 1 Barb. (N. Y.) 542; *Electric*

Where a chattel mortgage operates as an executory agreement to give a lien when the property comes into existence, some further act is necessary in order to make it actual and effectual as against creditors. If no further act is done by the parties to the instrument, to create such an actual lien, the levy of an execution upon the property by a creditor of the mortgagor operates to transfer the possession from the owner to that of the sheriff. As against his possession, the equities of the mortgagee are unavailing for any purpose.<sup>53</sup>

Where a mortgage covers chattels in existence, and also professes to cover property which the mortgagor may thereafter purchase, the fact that it is invalid as to property of the latter class does not render it invalid as to the existent property which is specified in it.<sup>54</sup>

But it is not necessary that property, in order to be a subject of a chattel mortgage, should be in actual existence. It is enough that it has a potential or possible existence, as, for example, in the case of the spontaneous product of the earth, or the increase of that which is in existence. In such a case the right to it, when it comes into existence, is regarded as a present vested right.<sup>55</sup>

So, also, in cases arising between a lessor of land and his lessee, a principle different from that generally applicable might operate to create a lien of the landlord upon the crops as they come into existence upon the land. The title to the land being in him, an agreement between him and the lessee for a lien upon the crops to be raised, to secure the payment of the rent, would operate and be given legal effect as a reservation, at the time, of the title to the product of the land.<sup>56</sup>

*Lighting Co. of Mobile v. Rust*, 117 Ala. 680, 23 South. 751; *Standard Brewery v. Nudelman*, 70 Ill. App. 356; *Otis v. Sill*, 8 Barb. (N. Y.) 102; *Gardner v. McEwen*, 19 N. Y. 123; *Kribbs v. Alford*, 120 N. Y. 519, 24 N. E. 811. Compare *Allen v. Windham Mfg. Co.* (C. C.) 87 Fed. 786; *Ainsworth v. Mobile Fruit & Trading Co.*, 102 Ga. 123, 29 S. E. 142; *Snow v. Ulmer*, 91 Me. 324, 39 Atl. 993, 64 Am. St. Rep. 237; *Midland State Bank v. Kilpatrick-Koch Dry Goods Co.*, 54 Neb. 410, 74 N. W. 837; *Kane v. Lodor*, 56 N. J. Eq. 268, 38 Atl. 966.

So as to after-acquired property. *Denier v. Bonewur*, 134 App. Div. 577, 119 N. Y. Supp. 313.

<sup>53</sup> *Rochester Distilling Co. v. Rasey*, 142 N. Y. 570, 37 N. E. 632, 40 Am. St. Rep. 635. Compare *Holroyd v. Marshall*, 10 H. L. Cas. 209; *McCaffrey v. Woodin*, 65 N. Y. 459, 22 Am. Rep. 644; *Moody v. Wright*, 13 Metc. (Mass.) 17, 46 Am. Dec. 706.

<sup>54</sup> *Gardner v. McEwen*, 19 N. Y. 123.

<sup>55</sup> *Grantham v. Hawley*, Hob. 132; *Rochester Distilling Co. v. Rasey*, 142 N. Y. 570, 37 N. E. 632, 40 Am. St. Rep. 635; *Desany v. Thorp*, 70 Vt. 31, 39 Atl. 309; *Graves Elevator Co. v. Callanan*, 11 App. Div. 301, 42 N. Y. Supp. 930.

<sup>56</sup> *Andrew v. Newcomb*, 32 N. Y. 417; *McCaffrey v. Woodin*, 65 N. Y. 459, 22 Am. Rep. 644; *Butt v. Ellett*, 19 Wall. 544, 22 L. Ed. 183. And see *Lemon v. Wolff*, 121 Cal. 272, 53 Pac. 801; *Hogan v. Atlantic Elevator Co.*, 66 Minn.

## 18. THE RIGHT OF POSSESSION

As the execution of a chattel mortgage invests the mortgagee with title subject to be defeated by subsequent performance of the condition, the right of possession, which ordinarily follows that of property, would pass with the title, under the transfer, in the absence of any express or implied agreement for the retention of the goods by the mortgagor. But it is not necessary that such an agreement should be expressed in terms; it may be implied from the provisions of the instrument. Thus, where the mortgage defines the circumstances under which the grantee shall become entitled to the right of possession, it may evince the mutual intent of the parties that, until it vests in the mortgagee, possession shall remain in the mortgagor.<sup>57</sup>

## 19. FRAUDULENT CHATTEL MORTGAGES

Numerous authorities deal with the subject of mortgages which, either upon their face or in connection with a contemporaneous oral agreement between the parties, are intended to authorize the mortgagor to continue to sell or otherwise to deal with the property as his own.

It is obvious that such an arrangement is strongly indicative of an intention to give a false credit to the mortgagor. Chattel mortgages were formerly in most of the states treated as invalid, unless actual possession was surrendered to the mortgagee; but it is not so now, for modern legislation has as a general thing (the cases to the contrary being exceptional) conceded the right to the mortgagor to retain possession if the transaction is for a good consideration, and bona fide. This concession is in obedience to the wants of trade, which deem it beneficial to the community that the owners of personal property should be able to make bona fide mortgages of it, to secure creditors, without any actual change of possession. But the creditor must take care in making his contract that it does not contain provisions of no advantage to him, but which benefit the debtor, and were designed to do so, and involve injuries to other creditors. The law will not sanction a proceeding of this kind. It will not allow the creditor to make use of his debt for any purpose other than his own indemnity. If he goes beyond this, and puts into the contract stipulations which have the effect to shield the property of his debtor, so that creditors are delayed in the collection of their debts, a court of equity will not lend

344, 69 N. W. 1. As to mortgages given by railroad companies to cover future acquired rolling stock, etc., see Jones, *Mortg.* §§ 152-154, 452.

<sup>57</sup> Hall v. Sampson, 35 N. Y. 274, 91 Am. Dec. 56.

its aid to enforce the contract. These principles are not disputed, but the courts of the country are not agreed in their application to mortgages. The cases cannot be reconciled by any process of reasoning, or on any principles of law. It is not difficult to see that the mere retention of use of personal property until default is altogether a different thing from the retention of possession accompanied with a power to dispose of it for the benefit of the mortgagor alone. The former is frequently permitted by statute, is consistent with the idea of security, and may be for the accommodation of the mortgagee; but the latter is inconsistent with the nature and character of a mortgage, is not for the protection of the mortgagee, and of itself furnishes a shield to a dishonest debtor. Where such a mortgagee permits the mortgagor not only to continue in possession, but to dispose of the property, sell it at retail, and use the money obtained to replenish his stock, and there is no covenant to account with the mortgagee, nor any recognition that the property is sold for the latter's benefit, the manifest object of it is to entitle the mortgagor to continue his business, and appear to the world as the absolute owner of the goods, and enjoy all the advantages resulting therefrom. Where the instrument on its face shows that the legal effect of it is to delay creditors, the law imputes to it a fraudulent purpose.<sup>58</sup>

In order to invalidate a mortgage because of its authorizing the mortgagor to dispose of the property generally for his own benefit, it is not necessary that such an authorization should be contained in terms in the mortgage. The arrangement may be shown by an oral agreement between the parties, and this, in turn, may be established by evidence of a course of dealing between the parties in accordance with which the mortgagor would be entitled thus to deal with the mortgaged chattels.<sup>59</sup>

So, also, if the mortgage contains merely an inhibition upon the mortgagor's selling "on credit," he is, by a necessary implication, authorized to sell for cash; and this fact, together with other circumstances showing the intention that he may continue to retail the mortgaged property and receive the proceeds to his own use, may suffice to render the mortgage void as against creditors; and where such is the effect of the written instrument, and there is no doubt what the language means, the mortgage is void, as matter of law; and, as the court would be obliged to set aside a verdict confirming its validity as

<sup>58</sup> *Robinson v. Elliott*, 22 Wall. 513, 22 L. Ed. 758; *Freeman v. Rawson*, 5 Ohio St. 1; *Barnet v. Fergus*, 51 Ill. 352, 99 Am. Dec. 547; *In re Hartman* (D. C.) 185 Fed. 196; *Zartman v. First Nat. Bank of Waterloo*, 189 N. Y. 267, 82 N. E. 127, 12 L. R. A. (N. S.) 1083.

<sup>59</sup> *Gardner v. McEwen*, 19 N. Y. 123; *Potts v. Hart*, 99 N. Y. 168, 1 N. E. 605; *In re Hartman*, *supra*.

often as one should be rendered, the question of fraud need not be submitted to the jury.<sup>60</sup> And if, for the reasons now under consideration, a mortgage is void as to a portion of the property, it is fraudulent as to all the property covered by the mortgage; for the mortgage is one single instrument, given to secure one debt, and, to render it valid, it must have been given in good faith, and for the honest purpose of securing the debt, and without any intent to hinder or defraud creditors. This cannot be true when the object in part or as to part of the property is to defraud creditors. The unlawful design vitiates the entire instrument.<sup>61</sup>

It would seem, however, that the cases which so decide are in error, in that they fail to distinguish between a mortgage that is merely ineffectual and one that is intended to defraud. Where the whole intent of the parties is embodied in a written instrument, or is to be inferred from frank and open dealings, there can be no intent to deceive creditors. There can be no fraud, unless the agreement reserving full beneficial power of disposition in the mortgagor is intended to be concealed from other creditors, while the instrument remains upon its face a valid and effectual mortgage. Otherwise, there is merely a frank but ineffectual attempt to prefer the mortgagee over other creditors who may subsequently try to acquire liens by legal proceedings.<sup>62</sup> In New York, by a recent statute, such an attempt to prefer may now be made effectual by filing a notice and posting it at every place where the goods are located, in respect to merchandise owned by the mortgagor at the time the mortgage is executed or subsequently acquired.<sup>63</sup>

But, notwithstanding the foregoing propositions, it is still true that a chattel mortgage is not per se void because of a provision contained in it allowing the mortgagor to sell the mortgaged property; for if the agreement is that, as he sells it himself, he is to account to the mortgagee for the proceeds, and apply them on the mortgage debt, it is unobjectionable. Such a sale and application of proceeds is the normal and proper purpose of a chattel mortgage, and within the precise boundaries of its operation and effect. It does no more than to substitute the mortgagor as the agent of the mortgagee, to do exactly

<sup>60</sup> *Edgell v. Hart*, 9 N. Y. 213, 59 Am. Dec. 532.

But, where fraud is to be inferred from the conduct of the parties, it is a question for the jury. *Gardner v. McEwen*, 19 N. Y. 123.

<sup>61</sup> *Russell v. Winne*, 37 N. Y. 591, 97 Am. Dec. 755.

<sup>62</sup> The court appears to have proceeded upon this view in *Zartman v. First Nat. Bank of Waterloo*, 189 N. Y. 267, 82 N. E. 127, 12 L. R. A. (N. S.) 1083.

<sup>63</sup> *Personal Property Law* (Consol. Laws, c. 41) § 45, as added in 1911, and *Lien Law* (Consol. Laws, c. 33) § 230, as amended in 1911 (Laws 1911, c. 326).

what the latter had the right to do, and what it was his privilege and duty to accomplish. It devotes the mortgaged property to the payment of the mortgage debt. If the mortgagor sells, and actually pays over the whole proceeds, nobody is harmed; for that only has happened which is the proper and lawful operation of the mortgage. If, on the other hand, under such an arrangement, such proceeds have not been paid over, the adverse lien is still unharmed; for, as against it, such proceeds are deemed paid over and applied in reduction of the mortgage debt, although, as between the mortgagor and mortgagee, the debt remains and is still unpaid.<sup>64</sup>

## 20. FILING AND REFILING

It is frequently provided by statute that, where the mortgagor retains possession<sup>65</sup> of mortgaged chattels, the mortgage shall be void as against his creditors, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage is filed; and it is commonly provided, further, that it must be refiled from time to time in order to continue it in force. An illustration of such statutes is found in the New York lien law, by which it is provided (section 230) that "every mortgage or conveyance intended to operate as a mortgage of goods and chattels, or of any canal boat, steam tug, scow or other craft, or the appurtenances thereto, navigating the canals of the state, which is not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, is absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees<sup>66</sup> in good faith, unless the mortgage, or a true copy thereof, is filed as directed in this article."

"Mortgages creating a lien upon real and personal property, executed by a corporation as security for the payment of bonds issued by such corporation or by any telegraph, telephone, or electric light corporation, and recorded as a mortgage of real property in each county where such property is located or through which the line of such telegraph, telephone, or electric light corporation runs, need not be filed or refiled as chattel mortgages."<sup>67</sup>

<sup>64</sup> *Brackett v. Harvey*, 91 N. Y. 214; *Robinson v. Elliott*, 22 Wall. 524, 22 L. Ed. 758; *Mansur & Tebbetts Implement Co. v. Beeman-St. Clair Co.* (Tex. Civ. App.) 45 S. W. 729; *Ufford v. Winchester*, 69 Vt. 542, 38 Atl. 239; *Skilton v. Codington*, 185 N. Y. 80, 77 N. E. 790, 113 Am. St. Rep. 885; *In re Hartman*, *supra*.

<sup>65</sup> *Drury v. Moors*, 171 Mass. 252, 50 N. E. 618; *Burchinell v. Schoyer*, 10 Colo. App. 117, 50 Pac. 217; *Martin v. Sexton*, 72 Ill. App. 395; *Schneider v. Kraby*, 97 Wis. 519, 73 N. W. 61.

<sup>66</sup> *Wolff v. Rausch*, 22 Misc. Rep. 108, 48 N. Y. Supp. 716.

<sup>67</sup> *Lien Law* (Consol. Laws, c. 33) § 231; *Westchester Trust Co. v. Hobby*



"An instrument, or a true copy thereof, if intended to operate as a mortgage of a canal boat, steam tug, scow or other craft, or of the appurtenances thereof, navigating the canals of this state, must be filed in the office of the comptroller, and need not be filed elsewhere. Every other chattel mortgage or an instrument intended to operate as such, or a true copy thereof, must be filed in the town or city where the mortgagor, if a resident of the state, resides at the time of the execution thereof, and if not a resident, in the town or city where the property mortgaged is, at the time of the execution of the mortgage. If there is more than one mortgagor, the mortgage, or a certified copy thereof, must be filed in each city or town within the state where each mortgagor resides at the time of the execution thereof." <sup>68</sup>

After further providing for the method of filing and indexing chattel mortgages, and for the official fees, the act proceeds to provide that "a chattel mortgage, except as otherwise provided in this article, shall be invalid as against creditors of the mortgagor, and against subsequent purchasers or creditors in good faith, after the expiration of the first or any existing term of one year, reckoning from the time of the first filing, unless (1) within 30 days next preceding the expiration of each such term, a statement containing a description of such mortgage, the names of the parties, the time when and place where filed, the interest of the mortgagee or of any person who has succeeded to his interest in the property claimed by virtue thereof, or (2) a copy of such mortgage and its endorsements, together with a statement attached thereto or endorsed thereon, showing the interest of the mortgagee or of any person who has succeeded to his interest in the mortgage, is filed in the proper office in the city or town where the mortgagor then resides, if he is then a resident of the town or city where the mortgage or a copy thereof or such statement was last filed; if not such resident, but a resident of the state, a true copy of such mortgage, together with such statement, shall be filed in the proper office of the town or city where he then resides; and if not a resident of the state, then in the proper office of the city or town where the property so mortgaged was at the time of the execution of the mortgage."

It will be noticed that, while the statute prescribes how and where chattel mortgages shall be filed, it does not in terms prescribe the time within which this is to be done. While the act does not in terms require an immediate filing, its purpose can only be satisfied by prompt and diligent action on the part of the mortgagee in filing his mortgage. Some time, of course, will necessarily elapse between the execution

*Bottling Co.*, 102 App. Div. 464, 92 N. Y. Supp. 482, affirmed 185 N. Y. 577, 78 N. E. 1114.

<sup>68</sup> *Id.* § 232.

and filing of the mortgage. Where it appears that due diligence was exercised in filing the mortgage, and there has been no unnecessary delay, and no actual intervening lien has been acquired, there would seem to be no ground upon which subsequent lienholders could question the validity of the mortgage. But a delay of four weeks in filing has been held not to be a compliance with the former statute on this subject, where there were no circumstances rendering so long a delay necessary, even though it is filed before the creditor's rights have attached.<sup>69</sup>

The filing of a first chattel mortgage at 2:30 in the afternoon (ten days after it was executed) of the same day a second chattel mortgage was executed cannot be regarded as notice to the second mortgagee of the first mortgage.<sup>70</sup>

## 21. THE RIGHT TO REDEEM

Although, upon the mortgagor's default, the absolute legal title to the property vests in the mortgagee, yet the mortgagor has, as already stated, an equitable right to redeem until the mortgagee has foreclosed it. This right he may enforce by suit.<sup>71</sup> A tender of the amount due is not necessary, as a provision is inserted in the judgment directing payment of the debt as a condition of the relief.<sup>72</sup>

The relief sought may be either the return of the property,<sup>73</sup> or, if the property has in the meantime been illegally sold by the mortgagee, a recovery of the value, less the amount of the mortgage debt;<sup>74</sup> while, if the sale has been lawful, the mortgagor may recover the surplus.<sup>75</sup> The right to redeem may be exercised by the mortgagor, or by any one who has a title to or lien on the property under or through the mortgagor.<sup>76</sup>

<sup>69</sup> Tooker v. Siegel-Cooper Co., 194 N. Y. 442, 87 N. E. 773. See, also, Karst v. Gane, 136 N. Y. 316, 32 N. E. 1073; Ledoux v. East River Silk Co., 19 Misc. Rep. 440, 44 N. Y. Supp. 489; Stephens v. Meriden Britannia Co., 13 App. Div. 268, 43 N. Y. Supp. 226. And, as to refining, in general, see Stevenson Brewing Co. v. Eastern Brewing Co., 22 App. Div. 523, 48 N. Y. Supp. 89; William Deering & Co. v. Hanson, 7 N. D. 288, 75 N. W. 249; Beskin v. Feigenspan, 32 App. Div. 29, 52 N. Y. Supp. 750.

<sup>70</sup> Huber v. Ehlers, 76 App. Div. 602, 79 N. Y. Supp. 150.

<sup>71</sup> Porter v. Parmley, 52 N. Y. 185; Lambert v. Miller, 38 N. J. Eq. 117; Stoddard v. Denison, 2 Sweeny (N. Y.) 54; Noyes v. Wyckoff, 30 Hun (N. Y.) 466; Brush v. Evans, 53 N. Y. Super. Ct. 523; Coe v. Cassidy, 72 N. Y. 133.

<sup>72</sup> Casserly v. Witherbee, 119 N. Y. 522, 23 N. E. 1000. And see Cartier v. Pabst Brewing Co., 112 App. Div. 419, 98 N. Y. Supp. 516.

<sup>73</sup> Porter v. Parmley, 52 N. Y. 185.

<sup>74</sup> Stoddard v. Denison, 2 Sweeny (N. Y.) 54.

<sup>75</sup> Davenport v. McChesney, 86 N. Y. 242.

<sup>76</sup> Hinman v. Judson, 13 Barb. (N. Y.) 629; Pettibone v. Drakeford, 37 Hun (N. Y.) 628.

## 22. FORECLOSURE

Inasmuch as, after default, and after the mortgagee has taken possession, the mortgagor retains the equitable right of redemption, the mortgagee is on his part afforded means of extinguishing this right, and having the respective rights of the parties finally adjusted. This subject is frequently regulated by statute. In most cases, however, the mortgagee may foreclose either by action, or, in some cases, by sale. An action lies in equity to foreclose a chattel mortgage; but the remedy by sale, under the power contained in the mortgage, is, in most cases, a more speedy and effectual means of extinguishing the equity of redemption. But the right to foreclose by action has not been taken away.<sup>77</sup>

Taking possession of mortgaged chattels, and selling them, prior to the contingencies mentioned in the mortgage upon which the mortgagee may proceed to foreclose, amounts to a conversion.<sup>78</sup>

## 23. DISCHARGE OF MORTGAGE

Where statutory provisions are made for the filing of chattel mortgages, the statutes also provide the method of discharging such mortgages of record. Thus, by the New York statute<sup>79</sup> it is provided that, "upon the payment or satisfaction of a chattel mortgage, the mortgagee, his assignee or legal representative, upon the request of the mortgagor or of any person interested in the mortgaged property, must sign and acknowledge a certificate setting forth such payment or satisfaction. The officer with whom the mortgage, or a copy thereof, is filed, must, on receipt of such certificate, file the same in his office, and write the word 'Discharged' in the book where the mortgage is entered, opposite the entry thereof; and the mortgage is thereby discharged."

<sup>77</sup> *Briggs v. Oliver*, 68 N. Y. 336, 339; *Lembeck & Betz Eagle Brewing Co. v. Sexton*, 184 N. Y. 185, 77 N. E. 38.

<sup>78</sup> *Johnston v. Robuck*, 104 Iowa, 523, 73 N. W. 1062; *Stage v. Van Leuven*, 77 App. Div. 646, 78 N. Y. Supp. 960.

<sup>79</sup> Lien Law (Consol. Laws, c. 33) § 238.

## SALES TO ARRIVE

### 24. IN GENERAL

Sales "to arrive" are frequently made, and "it is not always easy to determine in given instances whether the language used implies a condition or not, or what the real condition is."<sup>80</sup>

### 25. NATURE AND CHARACTERISTICS

But in a proper case of a sale "to arrive," apart from any additional and peculiar provisions, the contract is both conditional and executory. Certainly until arrival, the title to the goods does not pass to the vendee, and it may be that it does not pass until the goods are delivered.<sup>81</sup>

The contract is conditional as to both parties, and if the vessel does not arrive, or if, though it arrives, the goods are not on board, the contract is at an end. So, if a part only of the goods arrive, the seller would not be bound to deliver nor the purchaser to accept it. The same result follows if goods of the same general description, but not of the stipulated quality, arrive.<sup>82</sup>

These propositions rest, of course, upon the assumption that there is no warranty by the seller that they shall arrive, or that, arriving, they shall be of a particular quality; for, if such a warranty is made, he is liable thereon.<sup>83</sup> And the same principle applies where, in a contract for sale of goods to arrive, it is stipulated that they shall be equal to sample.<sup>84</sup> So, where the contract provides that goods of a certain quality are "to be shipped," "no arrival, no sale," the seller is liable if such goods are not shipped.<sup>85</sup>

Other conditions besides the "arrival" of the goods may be, and frequently are, introduced into the contract; as, for example, that

<sup>80</sup> Benj. Sales, § 578.

<sup>81</sup> Benedict v. Field, 16 N. Y. 595, 597.

<sup>82</sup> O'Donohue v. Leggett, 134 N. Y. 40, 31 N. E. 269; Clark v. Fey, 121 N. Y. 470, 24 N. E. 703.

<sup>83</sup> Shields v. Pettie, 4 N. Y. 122; Boyd v. Siffkin, 2 Camp. 326; Alewyn v. Pryor, 1 Ryan & M. 406; Lovatt v. Hamilton, 5 Mees. & W. 639; Johnson v. Macdonald, 9 Mees. & W. 600; Russell v. Nicoll, 3 Wend. (N. Y.) 112, 20 Am. Dec. 670.

<sup>84</sup> Dike v. Reitlinger, 23 Hun (N. Y.) 241; Simond v. Braddon, 2 C. B. (N. S.) 324; Jones v. Just, L. R. 3 Q. B. 197; Cleu v. McPherson, 1 Bosw. (N. Y.) 480.

<sup>85</sup> Abe Stein Co. v. Robertson, 167 N. Y. 101, 60 N. E. 329.

they shall be shipped by a particular vessel, or a particular route, or that they shall arrive in a particular vessel, or that the goods sold "to arrive" shall be of a particular quality. But a provision that the sale is of goods "to be shipped by" a specified vessel, "no arrival, no sale," refers to the arrival of the goods, and not to the arrival of the vessel named; and it is not to be inferred that the goods must arrive in that vessel;<sup>86</sup> and in this respect such a contract differs from a sale of goods "to arrive by" or "on arrival of" a ship named, as in *Lovatt v. Hamilton*,<sup>87</sup> *Johnson v. Macdonald*,<sup>88</sup> and *Hale v. Rawson*.<sup>89</sup>

<sup>86</sup> *Harrison v. Fortlage*, 161 U. S. 57, 16 Sup. Ct. 488, 40 L. Ed. 616; *Iasigi v. Rosenstein*, 141 N. Y. 414, 36 N. E. 509.

<sup>87</sup> 5 Mees. & W. 639.

<sup>88</sup> 9 Mees. & W. 600.

<sup>89</sup> 4 C. B. (N. S.) 85.



# SURETYSHIP AND GUARANTY

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## 1. DEFINITIONS

(a) *A guaranty* is an undertaking by one person that in case another, who is primarily liable to pay or perform some debt or obligation, fails to do so, he will be answerable for the nonpayment or nonperformance.

(b) *Suretyship* is the obligation assumed by one who binds himself with a principal, as an original promisor, for the payment or performance of a debt or obligation of the principal.<sup>1</sup>

(c) *A guarantor* is one who makes a guaranty.

<sup>1</sup> *McMillan v. Bull's Head Bank*, 32 Ind. 14, 2 Am. Rep. 323; *Megraw v. Hamilton Trust Co.*, 252 Pa. 425, 97 Atl. 581; *Robinson v. Roe*, 233 Fed. 936, 147 C. C. A. 610; *Dibert v. D'Arcy*, 248 Mo. 617, 154 S. W. 1116.

(d) *A guarantee* is one for whose benefit a guaranty is given.

(e) *A surety* is one who binds himself with a principal as an original promisor for the payment or performance of some debt or obligation of the principal.

(f) *A principal, or principal debtor*, is one who is ultimately liable for the payment or performance of some debt or obligation in respect of which another acts as guarantor or surety.

(g) *A creditor* is one who is entitled to enforce a debt or obligation against a principal debtor or surety, or to hold a guarantor answerable in case of nonpayment or nonperformance. In the latter case he is also termed a "guarantee."

(h) *Suretyship and Guaranty Compared.* The terms "suretyship" and "guaranty" are often used inaccurately, as if having the same meaning. But, while they have certain points of resemblance, there are important differences between them. Thus, both involve the liability of one person for a debt or obligation for which another is, as between themselves, ultimately liable. But, the surety being bound with his principal as an original promisor, he is himself a debtor from the beginning, and must see that the debt is paid, and is held, ordinarily, to know every default of his principal, and cannot protect himself by the mere indulgence of the creditor, nor by want of notice of the default of the principal, however such indulgence or want of notice may, in fact, injure him. On the other hand, the contract of a guarantor is his own separate contract that the thing guaranteed to be done by the principal shall be done—not a mere joint agreement to do it. A guarantor, therefore, is not bound to do what the principal has contracted to do, but only to answer for the consequences of the default of the principal. He is not invariably bound to take notice of non-performance by the principal; and if, when entitled to notice, he suffers damage through the creditor's failure to notify him, he is pro tanto discharged. It is not so with a surety.<sup>2</sup>

Usually, a surety is bound by the same terms of the same contract as his principal.<sup>3</sup>

<sup>2</sup> *McMillan v. Bull's Head Bank*, 32 Ind. 13, 2 Am. Rep. 323; *Wright v. Simpson*, 6 Ves. 714; *Saint v. Wheeler & Wilson Manufacturing Co.*, 95 Ala. 371, 10 South. 539, 36 Am. St. Rep. 210; *Campbell v. Sherman*, 151 Pa. 70, 25 Atl. 35, 31 Am. St. Rep. 735; *Deobold v. Oppermann*, 111 N. Y. 531, 19 N. E. 94, 2 L. R. A. 644, 7 Am. St. Rep. 760; *Watkins Medical Co. v. Lovelady*, 186 Ala. 414, 65 South. 52; *Society Operaia San Cristoforo Di Ricigliano v. Rock*, 176 Ill. App. 132; *Bedford v. Kelley*, 173 Mich. 492, 139 N. W. 250; *Stein v. Whitman*, 156 App. Div. 861, 142 N. Y. Supp. 4.

<sup>3</sup> *Powell v. Allen*, 11 Ill. App. 134; *Watson v. Beabout*, 18 Ind. 281; *Hunt v. Adams*, 7 Mass. 518.



(i) *Suretyship, Guaranty, and Indorsement Compared.* An indorsement is the writing of the name of a holder upon an instrument with the intent either to transfer the title to the same, or to strengthen the security of the holder by assuming a contingent liability for its future payment, or both. It strictly applies only to negotiable instruments.

An indorsement is classed by itself as a distinct body of contract rights and liabilities. It has its origin in, and is confined to, negotiability.<sup>4</sup> It is a contract, and one to which the law merchant and the common law have appended very peculiar conditions. It is a contract something in the nature of a guaranty;<sup>5</sup> something in the nature of a warranty, and to the liability under which the laws have attached the very unusual conditions of presentment, demand, and notice of dishonor.<sup>6</sup>

(j) *Guaranty and Warranty Distinguished.* Warranty differs from a guaranty in that it relates, not to some debt or obligation of any third party, but to some feature of an agreement made by the very person who also makes the warranty as a part thereof.<sup>7</sup>

(k) *Guaranties of Payment and of Collection.* The fundamental distinction between a guaranty of payment and one of collection is that in the first case the guarantor undertakes unconditionally that the debtor will pay, and the creditor may, upon default, proceed directly against the guarantor, without taking any steps to collect of the principal debtor, and the omission or neglect to proceed against him is not (except under special circumstances) any defense to the guarantor; while in the second case the undertaking is that, if the demand cannot be collected by legal proceedings, the guarantor will pay, and consequently legal proceedings against the principal debtor, and a failure to collect of him by those means, are conditions precedent to the liability of the guarantor; and to these the law, as established by numerous decisions, attaches the further condition that due diligence be exercised by the creditor in enforcing his legal remedies against the debtor.<sup>8</sup>

<sup>4</sup> *Orrick v. Colston*, 7 Grat. (Va.) 195.

<sup>5</sup> *Oakley v. Boorman*, 21 Wend. (N. Y.) 588; *Kingsland v. Koepp*, 137 Ill. 344, 28 N. E. 48, 13 L. R. A. 649.

<sup>6</sup> *Osgood's Adm'rs v. Artt* (C. C.) 17 Fed. 577; *Johns. Cas. Bills & N.* 107.

<sup>7</sup> *Wiley v. Inhabitants of Athol*, 150 Mass. 434, 23 N. E. 311, 6 L. R. A. 342; *De Col. Guaranty & S.* 1, 2.

<sup>8</sup> *McMurray v. Noyes*, 72 N. Y. 525, 28 Am. Rep. 180; *Cass v. Shewman*, 61 Hun, 472, 16 N. Y. Supp. 236. Compare *Campbell v. Sherman*, 151 Pa. 70, 25 Atl. 35, 31 Am. St. Rep. 735.

The general rule in regard to one who becomes the guarantor of the collection of a demand is that, in so doing, he undertakes that the claim is collectible by due course of law, and the guarantor only promises to pay when it is ascertained that it cannot be collected by suit prosecuted to judgment and execution against the principal; and the endeavor to so collect is a condition precedent to a right of action against the guarantor. And the fact of insolvency is no excuse for the failure to prosecute. The judgment must have been recovered, and the execution issued thereon must have been returned unsatisfied in whole or in part, before any liability is fastened upon the guarantor. And the judgment must have been recovered without unreasonable delay. Between the two extremes represented by a guaranty of collection and one of payment, however, the parties may, by the terms of the contract of guaranty, create variations upon these general principles.<sup>9</sup>

A guaranty of payment is a special form of contract, by which the guarantor renders himself liable under conditions other than those which, according to general principles, would be essential to establish his liability.<sup>10</sup> No notice of default to the guarantor is necessary;<sup>11</sup> and so generally of unconditional guaranties.<sup>12</sup>

(1) *Summary.* The true distinction between a surety and a guarantor is obscured by the fact that the term "surety" is frequently used in different senses. Thus:

(1) It is sometimes employed in a general sense, to designate any one who is liable to a third party for a debt or obligation for which another person is ultimately liable as the real principal; thus including both sureties and guarantors, and sometimes even indorsers, of commercial paper. An illustration of this use is found in the familiar propositions that a surety who is obliged to pay the debt secured is entitled to contribution from his co-sureties, and to reimbursement from the principal (De Col. Guar. & Sur. 307, 336)—propositions

<sup>9</sup> *Salt Springs Nat. Bank v. Sloan*, 135 N. Y. 371, 32 N. E. 231; *Dutcher v. Buck*, 96 Mich. 171, 55 N. W. 676, 20 L. R. A. 776; *Chatham Nat. Bank v. Pratt*, 135 N. Y. 423, 32 N. E. 236; *Mead v. Parker*, 111 N. Y. 259, 18 N. E. 727; *Cummings v. Arnold*, 3 Metc. (Mass.) 486, 37 Am. Dec. 155; *McCown v. Muldoon*, 147 Pa. 311, 23 Atl. 369; *Cownie v. Dodd*, 167 Iowa, 627, 149 N. W. 904.

<sup>10</sup> *Arents v. Com.*, 18 Grat. (Va.) 770; *Stearns, Suretyship*, § 61.

<sup>11</sup> *Miller v. Rinehart*, 119 N. Y. 368, 23 N. E. 819; *Bagley v. Cohen*, 121 Cal. 604, 53 Pac. 1117; *Kalmon v. Scarboro*, 11 Ga. App. 547, 75 S. E. 846; *Cownie v. Dodd*, 167 Iowa, 627, 149 N. W. 904; *H. S. Gile Grocery Co. v. Lachmund*, 75 Or. 122, 146 Pac. 519. But see *Hartman v. First Nat. Bank of Lancaster*, 103 Pa. 581.

<sup>12</sup> *Martin v. Monger*, 112 Ark. 394, 166 S. W. 566; *Kalmon v. Scarboro*, *supra*; *Cownie v. Dodd*, *supra*; *Hellos-Upton Co. v. Thomas*, 96 App. Div. 401, 89 N. Y. Supp. 222. But see *Rigg v. Blackburn*, 53 Pa. Super. Ct. 302.

which apply with equal force to both sureties and guarantors. "A guarantor has all the rights of a surety in equity." De Col. Guar. & Sur. 1, note.

So the terms "guaranty" and "guarantor" are often used in a generic sense, so as to include both guaranty and suretyship, as where De Colyar begins the sixth chapter of his work (page 211) by saying that, in proceeding to ascertain the extent and nature of a surety's liability, he proposes to call attention to the rules for the construction of guaranties; and, in the notes on the same page, it is said that doubtful language in a contract of guaranty may be construed most strongly against the guarantor, but that the meaning of the contract cannot be extended, to the prejudice of the surety—all the foregoing statements being intended, in fact, to apply both to sureties and guarantors.

(2) Sometimes the term "surety" is employed to distinguish the party thus designated from a guarantor, as where it is said that a surety, jointly bound with his principal as an original promisor, may be joined with the principal as a defendant in an action brought by the creditor upon their common contract;<sup>13</sup> while a guarantor, being bound by a distinct and separate contract from that of the principal, cannot thus be joined as a defendant in an action based on the principal contract, but must generally be sued separately.<sup>14</sup>

(3) Still, again, it frequently happens that the term "surety" is loosely employed in referring to one who is a guarantor as distinguished from a surety; as, for example, in *Cass v. Shewman*,<sup>15</sup> where the defendant had signed an agreement, upon a lease given by plaintiff to a third party, which the court say was in substance a guaranty, and yet they elsewhere speak of the defendant as the surety.

(4) It must also be noticed that the term "guarantor," even when correctly employed in its strict sense, may vary somewhat in meaning, and that the rights and liabilities of a guarantor may vary according to the nature of the given guaranty. Thus, a guarantor of collection is not liable, as already stated, until the creditor, after default, has exhausted the appropriate legal means (to an extent which varies somewhat in different jurisdictions) of enforcing payment by the principal; while a guarantor of payment usually is held liable at once upon default, even before any demand has been made upon the principal. This latter form of guaranty, which in fact approaches very closely to a contract of suretyship, is nevertheless distinguishable therefrom in this: that the surety undertakes, jointly with the prin-

<sup>13</sup> *Dart v. Sherwood*, 7 Wis. 523, 76 Am. Dec. 228.

<sup>14</sup> *Read v. Cutts*, 7 Greenl. (Me.) 186, 22 Am. Dec. 184.

<sup>15</sup> 61 Hun, 472, 16 N. Y. Supp. 236.

principal, to see that the debt is paid, and to pay it if the principal does not, while the guarantor of payment agrees, not to pay the debt, but in case of the principal's default to answer to the creditor for the consequences of such default.

In distinguishing between a surety and a guarantor, on the one hand, and an indorser of commercial paper, on the other, it is to be noticed, in addition to the distinction arising out of the peculiar rules as to presentment and notice of dishonor which exist in favor of the latter, that the indorser merely signs his name, his agreement being implied by the law, and not express, while the contract of a guarantor or surety is almost invariably expressed in terms.

(m) *A letter of credit* is a writing addressed to one or more individuals or classes of persons, or, generally, to any person, by which the signer undertakes to become responsible, either directly as a surety or collaterally as a guarantor, and either generally or specially, for payments to be made, or credits to be extended, to a third party named in the letter.

Letters of credit are governed by the same general legal principles as other guaranties.<sup>16</sup>

In construing a given guaranty, it is frequently difficult to determine on which side of the line separating limited from continuous guaranty it belongs. The intent of the party to be derived from the words is the only sure guide, and therefore very little aid is to be derived from the adjudged cases, which necessarily turn upon the peculiar phraseology of particular guaranties.<sup>17</sup>

(n) *A continuing guaranty* is one which is not confined to a particular transaction, but which covers successive future credits, advances, or obligations, existing at any given time, either generally or to a specified standing amount.<sup>18</sup>

But the mere fact that a guaranty is for an unlimited amount of goods does not render it continuing in respect to time, for it may merely guarantee any amount of purchases to be made at a given time.<sup>19</sup>

(o) *General and Special Guaranties.* Guaranties are of two kinds general or special. They are general when they guarantee any person

<sup>16</sup> *Bank of Montreal v. Recknagel*, 109 N. Y. 482, 17 N. E. 217.

<sup>17</sup> *McShane Co. v. Padian*, 142 N. Y. 207, 36 N. E. 880.

<sup>18</sup> *Beakes v. Da Cunha*, 126 N. Y. 298, 27 N. E. 251; *Sherburne v. J. W. Butler Paper Co.*, 40 Ill. App. 383; *Smith v. Van Wyck*, 40 Mo. App. 522; *Dover Stamping Co. v. Noyes*, 151 Mass. 342, 24 N. E. 53.

<sup>19</sup> *Rogers v. Warner*, 8 Johns. (N. Y.) 119.

So there may be an implied limitation as to place. *Bradshaw v. Barber*, 125 Minn. 479, 147 N. W. 650.

who may act upon them, and special when the particular person or class of persons guaranteed is specified.<sup>20</sup>

This is the usual meaning of the terms defined. But the terms are also sometimes used in other senses. For a given guaranty may be general in certain aspects and special in others. Thus, it may be general as to the whole world, to whom the principal may be accredited, and to any portion of whom, at his own option, he may make the guarantor a debtor, and at the same time it may be special as to the amount of the credit; or it may be unlimited or general as to amount, and special as to the parties who may act upon it.<sup>21</sup> And even when general, both as to amount and persons, it may contemplate only a single transaction, or an open and continued credit embracing several transactions.<sup>22</sup>

It is always competent for a guarantor to limit his liability, either as to time, amount, or parties, by the terms of his contract; and, if any such limitation be disregarded by the party who claims under it, the guarantor is not bound. It follows that no one can accept its propositions, or acquire any advantage therefrom, unless he is expressly referred to or necessarily embraced in the description of the persons to whom the offer of guaranty is addressed.<sup>23</sup>

It has been suggested in some cases that the right of a party advancing money upon a general letter of credit to maintain an action on it might be questionable, on the ground that there is no privity of contract.<sup>24</sup>

But in this country the contrary doctrine is well settled, on the theory that the general letter is addressed to any and every person, and therefore gives to any person to whom it may be shown authority to advance upon its credit, so that it becomes, in legal effect, the same as if addressed to him by name.<sup>25</sup>

<sup>20</sup> *Evansville Nat. Bank v. Kaufmann*, 93 N. Y. 277, 45 Am. Rep. 204; *Lowry v. Adams*, 22 Vt. 160; *McCarroll v. Red Diamond Clothing Co.*, 105 Ark. 443, 151 S. W. 1012, 43 L. R. A. (N. S.) 475. Other definitions of general guaranty. *Ritchie v. Walter*, 166 Pa. 604, 31 Atl. 334.

<sup>21</sup> *Taylor v. Wetmore*, 10 Ohio, 491.

<sup>22</sup> *Union Bank of Louisiana v. Coster's Ex'rs*, 3 N. Y. 214, 53 Am. Dec. 280.

<sup>23</sup> *Robbins v. Bingham*, 4 Johns. (N. Y.) 476; *Evansville Nat. Bank v. Kaufmann*, 93 N. Y. 279, 45 Am. Rep. 204.

<sup>24</sup> *Bank of Ireland v. Archer*, 11 M. & W. 383; *Russell v. Wiggin*, 2 Story, 214, Fed. Cas. No. 12,165; *Torrance v. Bank*, L. R. 5 C. P. 252.

<sup>25</sup> *Union Bank of Louisiana v. Coster's Ex'rs*, 3 N. Y. 214, 53 Am. Dec. 280; *Duval v. Trask*, 12 Mass. 154; *Adams v. Jones*, 12 Pet. 207, 9 L. Ed. 1058; *Holmes v. A. J. Schwab & Sons*, 141 Ga. 44, 80 S. E. 313.

## FORMATION OF THE CONTRACT

### 2. FORM OF THE CONTRACT

Besides a consideration, it is essential that a contract of suretyship or guaranty should be between proper parties, viz. a promisor, a principal, and a promisee; and it is also essential that such contracts should describe or refer to these parties so as to identify them, either individually or as a class.<sup>26</sup>

Except as otherwise required by its nature in a given case or by statute, the contract may be oral, but in practice is almost always in writing. As a general rule the statute of frauds requires it to be in writing.<sup>27</sup>

### 3. ASSENT OF THE PARTIES—ACCEPTANCE

A contract of guaranty, like every other contract, can only be made by the mutual assent of the parties.<sup>28</sup>

Upon the question whether, or in what cases, the guarantee, in addition to accepting in fact, and acting upon, a guaranty, must notify the guarantor thereof, a difference of opinion exists.<sup>29</sup> In the federal courts, it is established, the guaranty is signed by the guarantor at the request of the guarantee, or if the latter's agreement to accept is contemporaneous with the guaranty, and constitutes its consideration and basis, or if the receipt from him of a valuable consideration, however small, is acknowledged in the guaranty, or if the instrument is in the form of a bilateral contract in which the guarantee binds himself to make the contemplated advances, or which otherwise creates by its recitals a privity of contract between the guarantor and guarantee, in all these cases the mutual assent is proved, and the delivery of the guaranty to him or for his use completes the contract. But if the guaranty is signed by the guarantor without any previous request of the guarantee, and in his absence, for no consideration moving between them except future advances to be made to the principal debtor, the guaranty is in legal effect an offer or proposal on the part of the guar-

<sup>26</sup> *Evansville Nat. Bank v. Kaufmann*, 93 N. Y. 279, 45 Am. Rep. 204.

<sup>27</sup> See p. 278, post.

<sup>28</sup> *Davis Sewing Mach. Co. v. Richards*, 115 U. S. 527, 6 Sup. Ct. 173, 29 L. Ed. 480; *American Woolen Co. of New York v. Moskowitz* (Sup.) 140 N. Y. Supp. 522.

<sup>29</sup> See *Clark, Cont.* (3d Ed.) p. 29.

antor, needing an acceptance and notice thereof by the other party to complete the contract.<sup>30</sup>

An offer to guarantee may be a proposition which is to become a contract upon the giving of a promise for a promise, in which case a notice of acceptance is necessary; or it may be an offer intended to become a contract upon the doing of the act referred to, in which case the doing of the act constitutes the acceptance of the offer and furnishes the consideration. But, even in such a case, if the act is of such a kind that knowledge of it will not quickly come to the guarantor, the promisee is bound to give him notice of his acceptance within a reasonable time after doing that which constitutes the acceptance.<sup>31</sup>

When notice of acceptance is required, the implication is that notice shall be given in a reasonable manner, which may be by mail or otherwise, according to circumstances. If notice by letter is enough, a due mailing suffices, although the notice is not in fact received;<sup>32</sup> and a due acceptance may arise by implication.<sup>33</sup>

In other jurisdictions, it is the fact of compliance with the outstanding offer, represented by a guaranty of a future obligation, which constitutes the consideration, and raises a privity of contract between the guarantor and the guarantee, and accordingly there is no general requirement of a notice of acceptance, such notice being unnecessary where the guaranty is absolute in form, and only required where it is conditional upon such notice.<sup>34</sup>

*Delivery.* Although delivery of an instrument, as distinguished from a meeting of the minds of the parties, is not essential to the formation of a contract, as a general proposition, there are cases in which such delivery is essential to the creation of the obligation of a surety

<sup>30</sup> Davis Sewing Mach. Co. v. Richards, 115 U. S. 527, 6 Sup. Ct. 173, 29 L. Ed. 480; Davis v. Wells Fargo & Co., 104 U. S. 164, 26 L. Ed. 686; City Council of Greenville v. Ormand, 51 S. C. 58, 28 S. E. 50, 39 L. R. A. 847, 64 Am. St. Rep. 663; Gano v. Farmers' Bank of Ky. at Georgetown, 103 Ky. 508, 45 S. W. 519, 82 Am. St. Rep. 596; Black, Starr & Frost v. Grabow, 216 Mass. 516, 104 N. E. 346, 52 L. R. A. (N. S.) 569; Smith & Co. v. Kimble, 31 S. D. 18, 139 N. W. 348, Ann. Cas. 1916A, 497; Linro Medicine Co. v. Moon, 190 Mo. App. 366, 177 S. W. 322.

<sup>31</sup> Bishop v. Eaton, 161 Mass. 499, 500, 37 N. E. 665, 42 Am. St. Rep. 437; Babcock v. Bryant, 12 Pick. (Mass.) 133; Whiting v. Stacy, 15 Gray (Mass.) 270; Black, Starr & Frost v. Grabow, supra.

<sup>32</sup> Bishop v. Eaton, 161 Mass. 500, 37 N. E. 665, 42 Am. St. Rep. 437; Reynolds v. Douglass, 12 Pet. 504, 9 L. Ed. 1171.

<sup>33</sup> Johnson v. Gerald, 169 Mass. 500, 48 N. E. 764.

<sup>34</sup> Union Bank of Louisiana v. Coster's Ex'rs, 3 N. Y. 212, 53 Am. Dec. 280; City Nat. Bank of Poughkeepsie v. Phelps, 86 N. Y. 493; Village of Chester v. Leonard, 68 Conn. 506, 37 Atl. 397; Taussig v. Reid, 145 Ill. 494, 32 N. E. 918, 36 Am. St. Rep. 504; Mussey v. Rayner, 22 Pick. (Mass.) 223; Howe v. Nickels, 22 Me. 175; Norton v. Eastman, 4 Greenl. (Me.) 521.

or guarantor. Thus, where one enters into an agreement with a building contractor, upon the faith of the latter's promise to give a bond as security, the other party is not bound until such bond is delivered, and the obligation of the sureties arises at the same time.<sup>35</sup>

So the circumstances in connection with the execution of any contract, though signed and witnessed, may be such as to establish the understanding that it was not to become operative until delivery.<sup>36</sup>

And a delivery may be conditional. Thus, if one surety signs and places a bond in the hands of his co-obligor with the stipulation that it is not to take effect unless another surety signs, and the obligee has notice of this, the first surety is not liable if the other did not sign.<sup>37</sup> But otherwise if the creditor has no notice of the fact.<sup>38</sup> And the mere fact that it is understood by the parties that another surety may sign later does not make such signing a condition of the contract.<sup>39</sup>

An offer to guarantee, though reciting a consideration, must be delivered to the person guaranteed, before it can take effect.<sup>40</sup>

And, in the case of a contract of guaranty or suretyship indorsed upon an instrument transferring an estate in land, a delivery of the principal instrument is requisite, delivery being an element of the execution of a deed.<sup>41</sup>

#### 4. CONSIDERATION

Like other contracts, that of a surety or guarantor requires a consideration.

(a) If the principal contract has already been executed, and the guaranty is given subsequently, there must be a new consideration, distinct from that supporting the principal contract. If, in such a case, the contract of guaranty is for the benefit of the guarantor, that fact constitutes a sufficient consideration.<sup>42</sup>

<sup>35</sup> *Smith v. Molleson*, 148 N. Y. 241, 42 N. E. 669.

<sup>36</sup> *Dietz v. Farish*, 79 N. Y. 520.

<sup>37</sup> *McFarlane v. Howell*, 16 Tex. Civ. App. 246, 43 S. W. 315; *Quimby v. Wood*, 19 R. I. 571, 35 Atl. 149; *City of Hallettsville v. Long*, 11 Tex. Civ. App. 180, 32 S. W. 567; *Schuff v. Pfanz*, 99 Ky. 97, 35 S. W. 132.

<sup>38</sup> *Etz v. Place*, 81 Hun, 203, 30 N. Y. Supp. 765; *Smith v. Board of Sup'rs of Peoria County*, 59 Ill. 412; *Brandt, S. & G.* (3d Ed.) §§ 456, 458.

<sup>39</sup> *Farmers' Nat. Bank v. Hatcher* (Iowa) 157 N. W. 876; *State ex rel. McClamrock v. Gregory*, 119 Ind. 503, 22 N. E. 1.

<sup>40</sup> *Davis v. Wells Fargo & Co.*, 104 U. S. 168, 26 L. Ed. 686.

<sup>41</sup> *Kahn v. John Kress Brewing Co.*, 17 Misc. Rep. 394, 39 N. Y. Supp. 1093. See, also, *Rosenwasser v. Amusement Enterprises*, 88 Misc. Rep. 57, 150 N. Y. Supp. 561.

<sup>42</sup> *Davis v. Wells Fargo & Co.*, 104 U. S. 165, 166, 26 L. Ed. 686; *Overton v. Tracey*, 14 Serg. & R. (Pa.) 311; *Partin v. Prince*, 159 N. C. 553, 75 S. E. 1080.



If the owner of a note indorses and transfers it for a consideration, and guarantees collection, no further consideration to him is requisite.<sup>43</sup>

The obligation of a surety to pay a note, though barred by the statute of limitations, is sufficient consideration for his subsequent guaranty thereof.<sup>44</sup>

(b) If a subsequent guaranty of an existing obligation is not given for the benefit of the guarantor, then an advantage accorded by the guarantee to the principal, involving forbearance, detriment, loss, or responsibility on the part of the guarantee, upon the faith of the guaranty, is a sufficient consideration.<sup>45</sup>

Where a debtor transfers property to a third person in consideration of the latter's promise to the debtor to pay the debt to the creditor, the latter may accept and adopt the promise when it becomes known to him, and may maintain an action upon it. When the promise in such cases is the consideration or condition upon which the third party has received the debtor's property, he thereby makes the debt his own, and assumes an independent duty of payment, irrespective of the liability of the principal or original debtor.<sup>46</sup>

Even where the obligation has been created, but is not yet due and payable, a new consideration must appear, in order to bind one who then guarantees it.<sup>47</sup>

An agreement by a creditor to forbear the collection of a debt presently due is a good consideration for an absolute or conditional promise of a third person to pay the debt, or for any obligation he may assume in respect thereto. Nor is it essential that the creditor should bind himself at the time to forbear or to give time. If he is requested by his debtor to extend the time, and a third person undertakes, in consideration of forbearance being given, to become liable as surety or otherwise, and the creditor does in fact forbear in reliance upon the undertaking, although he enters into no enforceable agreement to do so, his acquiescence in the request, and an actual forbearance in consequence thereof for a reasonable time, furnishes a good consideration for the collateral undertaking. In other words, a request, followed by performance, is sufficient, and mutual prom-

<sup>43</sup> *Gilligan v. Boardman*, 29 Me. 79; *D. M. Osborne & Co. v. Lawson*, 26 Mo. App. 554.

<sup>44</sup> *Miles v. Linnell*, 97 Mass. 298.

<sup>45</sup> *Traders' Nat. Bank v. Parker*, 130 N. Y. 420, 29 N. E. 1094; *Strong v. Sheffield*, 144 N. Y. 392, 39 N. E. 330; *Ware v. Adams*, 24 Me. 177; *West v. King*, 163 Ky. 561, 174 S. W. 11; *Noyes v. Adams*, 76 Wash. 412, 136 Pac. 696.

<sup>46</sup> *Clark v. Howard*, 150 N. Y. 238, 44 N. E. 695. See *Clark*, Cont. (3d Ed.) § 192.

<sup>47</sup> *Tenney v. Prince*, 4 Pick. (Mass.) 385, 16 Am. Dec. 347.

ises at the time are not essential, unless it was the understanding that the promisor was not to be bound except on condition that the other party entered into an immediate and reciprocal obligation to do the thing presented. The proposition of the guarantor is an outstanding offer, which the creditor may transform into a contract by an acceptance consisting in acting upon the faith thereof.<sup>48</sup>

In the absence of a specified time, a reasonable time is held to be intended.<sup>49</sup> In some jurisdictions, however, the rule is that mere forbearance by the creditor, in the absence of any agreement that he will forbear, is no consideration.<sup>50</sup>

And the fact that the collateral may not be enforceable until a definite time in the future does not operate to extend the time of payment of the principal debt or suspend the right to sue upon the original security.<sup>51</sup>

(c) If the contract of guaranty or suretyship is made at the same time with the principal contract, and the latter is based upon the former, then no distinct consideration is requisite;<sup>52</sup> for the guaranty or suretyship, on the one hand, and the execution of the principal contract by the guarantee, on the other, are considerations one for the other;<sup>53</sup> or, from another point of view, the consideration passing from the creditor supports both the principal contract and that of the surety or guarantor.<sup>54</sup>

In order that the principal contract and the guaranty should be contemporaneous within the meaning of the foregoing proposition, it is not necessary that they should be strictly simultaneous. Thus, if A. procures a credit from B. upon the assurance that he will procure a guaranty from C., and within a short time he does so, the trans-

<sup>48</sup> *Strong v. Sheffield*, 144 N. Y. 394, 39 N. E. 330; *Morton v. Burn*, 7 Adol. & E. 19; *Wilby v. Elgee*, L. R. 10 C. P. 497; *King v. Upton*, 4 Greenl. (Me.) 387, 16 Am. Dec. 266; *Leake*, Cont. p. 54; *Forth v. Stanton*, 1 Saund. 210, note (b). Compare *Cary v. White*, 52 N. Y. 138.

<sup>49</sup> *Strong v. Sheffield*, supra; *Oldershaw v. King*, 2 Hurl. & N. 517; *Calkins v. Chandler*, 36 Mich. 320, 24 Am. Rep. 593.

<sup>50</sup> *Hess' Estate*, 150 Pa. 346, 24 Atl. 676; *Manter v. Churchill*, 127 Mass. 31; *First Nat. Bank of Ft. Smith v. Nakdimen*, 111 Ark. 223, 163 S. W. 785, Ann. Cas. 1916A, 968. See *Clark*, Cont. (3d Ed.) p. 152.

<sup>51</sup> *U. S. v. Hodge*, 6 How. 279, 12 L. Ed. 437; *Fallkill Nat. Bank of Poughkeepsie v. Sleight*, 1 App. Div. 191, 37 N. Y. Supp. 155.

<sup>52</sup> *Simons v. Steele*, 36 N. H. 73; *Erie Co. Sav. Bank v. Colt*, 104 N. Y. 537, 11 N. E. 54.

<sup>53</sup> *Davis v. Wells Fargo & Co.*, 104 U. S. 165, 26 L. Ed. 686.

<sup>54</sup> *Erie Co. Sav. Bank v. Colt*, supra; *Gillighan v. Boardman*, 29 Me. 79; *Hopkins v. Richardson*, 9 Grat. (Va.) 494; *Leonard v. Vredenburg*, 8 Johns. (N. Y.) 29, 5 Am. Dec. 317; *Darby v. Berney Nat. Bank*, 97 Ala. 645, 11 South. 881.

actions are regarded as simultaneous, and no separate and distinct consideration to C. is requisite.<sup>55</sup>

(d) When the contract of guaranty or suretyship is tendered before the principal contract is made, as in the case of a letter of credit, and thus constitutes an outstanding offer, it becomes a binding contract, when accepted and acted upon, either with or without notice, according to the varying laws of different jurisdictions.<sup>56</sup>

## 5. COMPETENCY TO CONTRACT

The usual rules applicable to other contracts in respect to the capacity of corporations,<sup>57</sup> infants,<sup>58</sup> intoxicated persons,<sup>59</sup> lunatics,<sup>60</sup> and persons under duress<sup>61</sup> to bind themselves by contract, apply to contracts of suretyship and guaranty, except as sometimes varied by statute.

The same principle applies to married women, except that general statutes conferring the right to contract have sometimes been construed not to cover the right to make contracts of suretyship, and that in New Jersey and some other states married women are prohibited from binding themselves as sureties.<sup>62</sup>

<sup>55</sup> *Oppenheim v. Waterbury*, 86 Hun, 122, 33 N. Y. Supp. 183; *McNaught v. McClaughry*, 42 N. Y. 22, 1 Am. Rep. 487; *Moies v. Bird*, 11 Mass. 436, 6 Am. Dec. 179; *Leonard v. Wildes*, 36 Me. 265; *Hawkes v. Phillips*, 7 Gray (Mass.) 286; *Smith v. Molleson*, 148 N. Y. 241, 42 N. E. 669.

<sup>56</sup> *Evansville Nat. Bank v. Kaufmann*, 93 N. Y. 279, 45 Am. Rep. 204; *Union Bank of Louisiana v. Coster's Ex'rs*, 3 N. Y. 211, 53 Am. Dec. 280; *Davis v. Wells Fargo & Co.*, 104 U. S. 166, 26 L. Ed. 686; *Kennaway v. Treleavan*, 5 Mees. & W. 498. See p. 270, ante.

<sup>57</sup> *Koehler & Co. v. Reinheimer*, 26 App. Div. 1, 49 N. Y. Supp. 755; *Louisiana State Bank v. Orleans Nav. Co.*, 3 La. Ann. 304.

<sup>58</sup> *Maples v. Wightman*, 4 Conn. 376, 10 Am. Dec. 149; *Kline v. Beebe*, 6 Conn. 503; *Reed v. Lane*, 61 Vt. 482, 17 Atl. 796; *Patchin v. Cromach*, 13 Vt. 334.

<sup>59</sup> *Page v. Krekey*, 137 N. Y. 311, 33 N. E. 311, 21 L. R. A. 409, 33 Am. St. Rep. 731; *Harty v. Smith*, 74 Ill. App. 194.

<sup>60</sup> *Van Patton v. Beals*, 46 Iowa, 62; *Seaver v. Phelps*, 11 Pick. (Mass.) 304, 22 Am. Dec. 372.

<sup>61</sup> See post, p. 276.

<sup>62</sup> *Todd v. Bailey*, 58 N. J. Law, 10, 32 Atl. 696; *Thacker v. Thacker*, 125 Ind. 489, 25 N. E. 595; *Taylor v. Acom*, 1 Ind. T. 436, 45 S. W. 130; *Wolf v. Zimmerman*, 127 Ind. 486, 26 N. E. 173; *Freeman v. Coleman*, 86 Ga. 590, 12 S. E. 1064; *Walker v. Joseph Dixon Crucible Co.*, 47 N. J. Eq. 342, 20 Atl. 885; *Athol Mach. Co. v. Fuller*, 107 Mass. 437; *Wiltbank v. Tobler*, 181 Pa. 108, 37 Atl. 188; *Willard v. Eastham*, 15 Gray (Mass.) 328, 77 Am. Dec. 366.

As to the liability of attorneys, where a statute or court rule requires that they shall not act as sureties on bonds required in legal proceedings,

One who takes a promissory note bearing the indorsement of a firm, either as guarantors or sureties, takes it burdened with the presumption that the firm name was not signed in the usual course of partnership business. And, in order to recover, the holder is required to show special authority to make the indorsement on the part of the partner who signed the firm name, or an authority to be implied from the common course of business of the firm, or previous course of dealing between the parties, or that the indorsement was subsequently adopted and acted upon by the firm.<sup>63</sup>

*Duress.* A bond executed under the duress of the principal is void as to the surety also, if the surety acted without knowledge of the fact of the duress; and knowledge of the imprisonment does not necessarily involve knowledge of its want of legality; but, if the surety knows of the duress when he undertakes to bind himself, the duress does not relieve him.<sup>64</sup>

The reason for the rule is that duress is illegal, a contract procured by duress is corrupt in its origin, and the wrongdoer should not be allowed to take a benefit from his wrongful act. Besides, if the surety contracts in ignorance of the duress, it materially increases the risk beyond that assumed in the usual course of business of that kind.<sup>65</sup>

Other authorities, however, hold that duress of the principal is not an available defense for the surety.<sup>66</sup> Both principal and surety may be relieved by proof of duress as against both.<sup>67</sup>

see *Evans v. Harris*, 47 N. Y. Super. Ct. (15 Jones & S.) 366; *Holandsworth v. Com.*, 11 Bush (Ky.) 617.

<sup>63</sup> *Clarke v. Wallace*, 1 N. D. 404, 48 N. W. 339, 26 Am. St. Rep. 636; *Sweetser v. French*, 2 Cush. (Mass.) 309, 48 Am. Dec. 666; *National Security Bank v. McDonald*, 127 Mass. 82; *Schermerhorn v. Schermerhorn*, 1 Wend. (N. Y.) 119; *Moynahan v. Hanaford*, 42 Mich. 329, 3 N. W. 944; *Moore v. Stevens*, 60 Miss. 809. See *Andrews v. Congar*, 131 U. S. clxxxiii, appx. and 26 L. Ed. 90; *Winn v. Hillyer*, 43 Mo. App. 139. See *Norton, B. & N.* (4th Ed.) pp. 244, 440.

<sup>64</sup> *Patterson v. Gibson*, 81 Ga. 804, 10 S. E. 9, 12 Am. St. Rep. 356; *Osborn v. Robbins*, 36 N. Y. 365; *State v. Brantley*, 27 Ala. 44; *Fisher v. Shattuck*, 17 Pick. (Mass.) 252.

See *Brandt, S. & G.* (3d Ed.) § 21. If the surety may not set up duress, he could recover against the principal and thus deprive the latter of his defense.

<sup>65</sup> *Patterson v. Gibson*, supra.

<sup>66</sup> *Hauscombe v. Standing*, Cro. Jac. 187; *Robinson v. Gould*, 11 Cush. (Mass.) 55; *Bowman v. Hiller*, 130 Mass. 153, 39 Am. Rep. 442; *Plummer v. People*, 16 Ill. 358. Justice Paxson, in *Griffith v. Sitgreaves*, 90 Pa. 161, after reviewing many cases of the latter class, states that in all of them the duress was either upon the party seeking to avoid the contract sued on or it was known to him. See *Fairbanks v. Snow*, 145 Mass. 154, 13 N. E. 596, 1 Am. St. Rep. 446, for a general discussion of duress, its nature and effect.

<sup>67</sup> *U. S. Tingley*, 5 Pet. 115, 8 L. Ed. 66.

*Illegality.* If the principal contract is contrary to public policy, the sureties or guarantors are not liable, and the same principle applies where the contract of suretyship or guaranty is itself contrary to public policy.

Thus, if A., having embezzled funds of B., gives his note for the amount in settlement, and C. guarantees the note on condition that A. shall not be prosecuted, or if a public board illegally loans public moneys to one for his private use, and takes back his note for the same, which a third party signs as surety, the guarantor or surety is not liable.<sup>68</sup>

But if an administrator, in order to induce one to go upon his official bond, deposits with him the funds of the estate as security, this does not release the surety in case of a default on the part of the administrator; for the surety, by executing the bond, secured the appointment of the administrator upon the strength thereof. The giving of the bond is legal, and the only illegality consists in the attempt to illegally protect the surety from the legal liability he assumes—an illegality in which the persons for whose benefit the bond is given have no part.<sup>69</sup>

While it is a general rule that the invalidity of the principal contract invalidates a guaranty, there are important exceptions. Where the creditor bases his claim upon his own misconduct, such as fraud, duress, or usury, or upon a consideration that is against public policy,<sup>70</sup> he may not recover, either upon the principal or the collateral obligation; but otherwise the mere fact that the principal contract is unenforceable or voidable is no defense to the surety. Indeed, that may be the very reason that the collateral security was required and given, as where the principal is incompetent,<sup>71</sup> or his contract does not comply with the statute of frauds.<sup>72</sup>

<sup>68</sup> *McMahon v. Smith*, 47 Conn. 221, 36 Am. Rep. 67; *Howard v. Smith*, 91 Tex. 8, 38 S. W. 15; *Rouse v. Mohr*, 29 Ill. App. 321; *Gorham v. Keyes*, 137 Mass. 583; *Board of Education of Hartford Tp. v. Thompson*, 33 Ohio St. 321; *Mercantile Trust Co. of Illinois v. Kastor*, 191 Ill. App. 219; *Henry & Co. v. Fry*, 78 Misc. Rep. 130, 137 N. Y. Supp. 894; *Franklin v. The Duncan*, 133 Tenn. 472, 182 S. W. 230, Ann. Cas. 1917c, 1080.

<sup>69</sup> *Deobold v. Oppermann*, 111 N. Y. 531, 19 N. E. 94, 2 L. R. A. 644, 7 Am. St. Rep. 760.

<sup>70</sup> See cases just cited.

<sup>71</sup> *International Text-Book Co. v. Mabbott*, 159 Wis. 423, 150 N. W. 429; *Kimball v. Newell*, 7 Hill (N. Y.) 116; *Wiggins' Appeal*, 100 Pa. 155.

<sup>72</sup> *Backus v. Feeks*, 71 Wash. 508, 129 Pac. 86, Ann. Cas. 1914C, 553.

## 6. STATUTE OF FRAUDS

The English statute of frauds (29 Car. II. c. 3), which is substantially followed by the statutes of most of our states, provides, in section 4, par. 2, "that no action shall be brought whereby to charge \* \* \* the defendant upon any special promise to answer for the debt, default or miscarriage of another person \* \* \* unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

(a) The term "special promise" is designed to avoid only such promises as are especially and particularly to answer for the debts of others, and not those which, while incidentally assuming the responsibility for such debts, are wholly or principally for the purpose of performing some distinct obligation of the promisor.<sup>73</sup>

Under this rule, the holder of a note or other security is bound by a verbal guaranty of its payment, made for the purpose of inducing another to purchase it.<sup>74</sup> So, in case of assignment and guaranty of judgment.<sup>75</sup> So, also, where a person having property of his debtor to sell for payment of the debt guarantees the title to induce the promisee to buy it.<sup>76</sup> And the promise by a *del credere* agent to his prin-

<sup>73</sup> *Durham v. Manrow*, 2 N. Y. 533; *Mallory v. Gillett*, 21 N. Y. 412; *Sutton v. Grey* [1894] 1 Q. B. 285; *Little v. Edwards*, 69 Md. 499, 16 Atl. 134; *Davis v. Patrick*, 141 U. S. 479, 12 Sup. Ct. 58, 35 L. Ed. 826; *Mitchell v. Beck*, 88 Mich. 342, 50 N. W. 305; *First Nat. Bank of Sing Sing v. Chalmers*, 120 N. Y. 658, 24 N. E. 848. A contract of reinsurance has been held not within the statute. *Bartlett v. Fireman's Fund Insurance Co.*, 77 Iowa, 155, 41 N. W. 601. But see, *contra*, *Egan v. Fireman's Insurance Co.*, 27 La. Ann. 368.

See *Clark*, Cont. (3d Ed.) § 40. The only apparent reason why such contracts are required to be in writing rather than others is that, where a person has assumed an obligation, not for his own benefit, but solely for the accommodation of another, who remains primarily liable, it is but just that his undertaking should be very clearly proved, since it lacks inherent probability. But where the promise, though to pay the debt of another, is made in consideration of some benefit to the promisor distinct from the benefit to the third person, there is no more reason why it should be in writing than in the case of any other promise. It is not within the spirit of the statute. See cases following.

<sup>74</sup> *Milks v. Rich*, 80 N. Y. 269, 36 Am. Rep. 615; *Cardell v. McNiel*, 21 N. Y. 338; *Darst v. Bates*, 95 Ill. 493, at page 512.

<sup>75</sup> *Little v. Edwards*, 69 Md. 499, 16 Atl. 134.

<sup>76</sup> *Farnham v. Chapman*, 61 Vt. 395, 18 Atl. 152. But see *Dows v. Swett*, 134 Mass. 142, 45 Am. Rep. 310.

cial to guarantee the solvency of the persons to whom he sells goods is not within the statute.<sup>77</sup>

Again, if a creditor has, or is about to file, a lien on property to secure his claim, and a third person, whose interests are or may be prejudiced thereby, guarantees the debt in consideration of a release of the lien or forbearance to file it, his object is to remove or prevent the lien, and the guaranty is merely incidental, and some courts hold that it need not be in writing;<sup>78</sup> though there is authority to the contrary, where the liability of the debtor continues.<sup>79</sup> And it has even been held that where the owner of a building, on which the contractor has abandoned work, promises to pay the contractor's workmen what is due them from the contractor if they will go on with the work, the undertaking is original; or to pay a materialman if he will continue to supply materials to the contractor if the contractor fails to pay as agreed.<sup>80</sup> In the case last cited, *Andre v. Bodman*, the claim against the contractor, it seems, was given up, so that there no longer existed any primary liability of a third person.<sup>81</sup> But the contrary has been held.<sup>82</sup>

(b) "*Debt, default, or miscarriage.*" The words, "debt, default, or miscarriage," seem, as said by De Col. Guar. & Sur. p. 61, to "point to three distinct kinds of guaranty, namely: (1) Guaranties for the payment of a 'debt' already contracted by another person; (2) guaranties against the 'default' of another person, i. e. for the payment of debts to be contracted by another person, or against loss that may occur from another's future breach of duty; and (3) guaranties against the 'miscarriage' of another person, i. e. against loss that may occur from another's past or future breaches of duty." The exact sense intended by the framers of the act to be attributed to each of these

<sup>77</sup> *Couturier v. Hastie*, 8 Exch. 40, 5 H. L. Cas. 673; *Sherwood v. Stone*, 14 N. Y. 267; *Wolff v. Koppel*, 5 Hill (N. Y.) 458; *Id.*, 2 Denio (N. Y.) 368, 43 Am. Dec. 751; *Swan v. Nesmith*, 7 Pick. (Mass.) 220, 19 Am. Dec. 282.

<sup>78</sup> *Fitzgerald v. Dressler*, 7 C. B. (N. S.) 374; *Smith v. Exchange Bank*, 110 Pa. 508, 1 Atl. 760; *Wills v. Brown*, 118 Mass. 138; *Prime v. Koehler*, 77 N. Y. 91.

<sup>79</sup> *Nelson v. Boynton*, 3 Metc. (Mass.) 396, 37 Am. Dec. 148; *Mallory v. Gillett*, 21 N. Y. 412; *Bunneman v. Wagner*, 16 Or. 433, 18 Pac. 841, 8 Am. St. Rep. 306; *Clark v. Jones*, 85 Ala. 127, 4 South. 771.

<sup>80</sup> *Raabe v. Squier*, 148 N. Y. 81, 42 N. E. 516; *Andre v. Bodman*, 13 Md. 241, 71 Am. Dec. 628.

<sup>81</sup> *Crawford v. Edison*, 45 Ohio St. 239, 13 N. E. 80; *Greenough v. Eichholtz* (Pa.) 15 Atl. 712; *Yeoman v. Mueller*, 33 Mo. App. 343; *Buchanan v. Moran*, 62 Conn. 83, 25 Atl. 396.

<sup>82</sup> See *Farnham v. Davis*, 79 Me. 282, 9 Atl. 725; *Greene v. Latcham*, 2 Colo. App. 416, 31 Pac. 233; *Wilhelm v. Voss*, 118 Mich. 106, 76 N. W. 308.

words, respectively, has been a subject of frequent speculation and some doubt.<sup>83</sup>

However, it is settled that, taken together, they include all liabilities of a third person, however they may arise, and therefore include liabilities arising out of a wrong act or tort as well as those arising out of contract.<sup>84</sup> They also include prospective as well as existing liabilities. "If the future primary liability of a principal is contemplated as the basis of the promise of a guarantor, such promise is within the statute of frauds, precisely as it would be if the liability existed when the promise was made."<sup>85</sup> A promise by one person to indemnify another for becoming a guarantor for a third is not within the statute.<sup>86</sup>

(c) "*Of another person.*" The promise contemplated by the statute is a promise to answer for the debt, default, or miscarriage of "another person," or, in other words, a contract of guaranty or suretyship. The statute does not apply to single promises or undertakings, though the benefit accrues to another than the promisor. There must be three parties in contemplation—a person who is actually or prospectively liable to another person, and a third person who promises the creditor to answer for the debt or liability; or, in other words, a creditor, a principal debtor, and a guarantor of the debt, or surety. Though there is considerable conflict between the courts in their construction of this clause of the statute, the following rules for determining whether a contract comes within it are established by the weight of authority:

(d) There must be either a present or prospective liability of a third person for which the promisor agrees to answer. If the promisor becomes himself solely, and not collaterally, liable, the promise is not within the statute, though the benefit from the transaction accrues to a third person.<sup>87</sup> If, for instance, two persons come into a store, and one buys, and the other, to gain him credit, promises the seller, "If he does not pay you, I will," this is a collateral undertaking, and must be in writing; but if he says, "Let him have the goods, and I will pay," and credit is given to him alone, he is himself the buyer, and the undertaking is original.<sup>88</sup> In other words, whether the promise

<sup>83</sup> Throop, Verb. Agreem. 192.

<sup>84</sup> Kirkham v. Marter, 2 Barn. & Ald. 613. And see Turner v. Hubbell, 2 Day (Conn.) 457, 2 Am. Dec. 115; Mountstephen v. Lakeman, L. R. 7 Z. B. 202.

<sup>85</sup> Mead v. Watson, 57 Vt. 426. And see Matson v. Wharam, 2 Term R. 80; Matthews v. Milton, 4 Yerg. (Tenn.) 576, 26 Am. Dec. 247.

<sup>86</sup> Jones v. Bacon, 145 N. Y. 446, 40 N. E. 216. But see p. 282, post.

<sup>87</sup> Baldwin v. Hiers, 73 Ga. 739; Morris v. Osterhout, 55 Mich. 262, 21 N. W. 339; De Witt v. Root, 18 Neb. 567, 26 N. W. 360.

<sup>88</sup> Birkmye v. Darnell, 1 Salk. 27; Hartley v. Varner, 88 Ill. 561; Nelson



in such a case is within the statute depends on how the credit was given. If it was given exclusively to the promisor, his undertaking is original;<sup>89</sup> but it is collateral if any credit was given to the other party.<sup>90</sup>

(e) Even though there is an existing liability of a third person for which the promisor undertakes to answer, still the promise is not within the statute, if the terms are such that it effects an extinguishment of such liability; in other words, the liability of the original debtor must continue. A promise to pay another's debt in consideration of the creditor's doing something which will extinguish his claim against the debtor, and release him absolutely, need not be in writing.<sup>91</sup> To take the promise out of the statute, the original debtor's release must be absolute. If the creditor may still hold him liable at his option, the promise must be in writing.<sup>92</sup> The fact that a lien against the original debtor is released has been held immaterial, if the debtor himself remain liable.<sup>93</sup> A promise to pay another's debt merely, if the promisee will forbear to sue the debtor, which he does, is within the statute.<sup>94</sup> Novations fall within this class of agreements.

(f) The promise must contemplate payment by the promisor out of

*v. Boynton*, 3 Metc. (Mass.) 396, 37 Am. Dec. 148; *Greene v. Burton*, 59 Vt. 423, 10 Atl. 575; *Geelan v. Reid*, 22 Ill. App. 165; *Higgins v. Hallock*, 60 Hun, 125, 14 N. Y. Supp. 550; *Boston v. Farr*, 148 Pa. 220, 23 Atl. 901; *Crowder v. Keys*, 91 Ga. 180, 16 S. E. 986; *Mountstephen v. Lakeman*, L. R. 7 H. L. 17. And see cases cited above and in the following notes.

<sup>89</sup> *Chase v. Day*, 17 Johns. (N. Y.) 114; *Morris v. Osterhout*, 55 Mich. 262, 21 N. W. 339; *Larson v. Jensen*, 53 Mich. 427, 19 N. W. 130; *Hartley v. Varner*, 88 Ill. 561; *Myer v. Grafflin*, 31 Md. 350, 100 Am. Dec. 66; *Grant v. Wolf*, 34 Minn. 32, 24 N. W. 289; *Ellis v. Murray*, 77 Ga. 542; *Hake v. Solomon*, 62 Mich. 377, 28 N. W. 908; *Hazeltine v. Wilson*, 55 N. J. Law, 250, 26 Atl. 79.

<sup>90</sup> *Welch v. Marvin*, 36 Mich. 59; *Cahill v. Bigelow*, 18 Pick. (Mass.) 369; *Norris v. Graham*, 33 Md. 56; *Matthews v. Milton*, 4 Yerg. (Tenn.) 576, 26 Am. Dec. 247; *Baldwin v. Hiers*, 73 Ga. 739; *Langdon v. Richardson*, 58 Iowa, 610, 12 N. W. 622; *Bugbee v. Kendrick*, 130 Mass. 437; *Mead v. Watson*, 57 Vt. 426; *Studley v. Barth*, 54 Mich. 6, 19 N. W. 568; *Robertson v. Hunter*, 29 S. C. 9, 6 S. E. 850.

<sup>91</sup> *Mallory v. Gillett*, 21 N. Y. 412; *Goodman v. Chase*, 1 Barn. & Ald. 297; *Teeters v. Lamborn*, 43 Ohio St. 144, 1 N. E. 513; *Andre v. Bodman*, 13 Md. 241, 71 Am. Dec. 628; *Meriden Britannia Co. v. Zingsen*, 48 N. Y. 247, 8 Am. Rep. 549; *Curtis v. Brown*, 5 Cush. (Mass.) 488; *Mulcrone v. American Lumber Co.*, 55 Mich. 622, 22 N. W. 67; *Runde v. Runde*, 59 Ill. 98; *Whittemore v. Wentworth*, 76 Me. 20; *Green v. Solomon*, 80 Mich. 234, 45 N. W. 87; *Carlisle v. Campbell*, 76 Ala. 247.

<sup>92</sup> *Nelson v. Boynton*, 3 Metc. (Mass.) 396, 37 Am. Dec. 148; *Welch v. Marvin*, 36 Mich. 59; *Waggoner v. Gray's Adm'rs*, 2 Hen. & M. (Va.) 612; *Willard v. Bosshard*, 68 Wis. 454, 32 N. W. 538; *Hill v. Frost*, 59 Tex. 25; *Pfaff v. Cummings*, 67 Mich. 143, 34 N. W. 281.

<sup>93</sup> *Nelson v. Boynton*, *supra*; *Mallory v. Gillett*, 21 N. Y. 412.

<sup>94</sup> *Gump v. Halberstadt*, 15 Or. 356, 15 Pac. 467, containing a collection of

his own property, or, at least, not out of the property of the debtor, from which, or from the proceeds of which, the promisor is under a duty to pay or is authorized to pay; for in such a case the payment is, in effect, by the debtor. The statute has no application to "cases where the original debtor places property of any kind in the hands of a third person, and that person promises to pay the claims of a particular creditor of the debtor. The promise, in such case, is an original promise, and the property placed in his hands is its consideration. In this class of cases it is immaterial whether the liability of the original debtor continues or not."<sup>95</sup>

(g) A promise to pay another's debt, to come within the statute, must, it is said, be made to the creditor, and not to the debtor. A promise to the debtor himself to pay his debt for him does not require writing.<sup>96</sup> Illustrations of this are where a person buys land or goods, and agrees to pay the purchase money to a creditor of the seller, or, as part of the consideration, assumes a mortgage or other indebtedness of the seller. This is no more than a promise to pay the promisor's own debt in a particular way.<sup>97</sup>

It may be suggested that the reason why these promises are not within the statute is because they were made for a distinct benefit to the promisor, and not merely for the benefit of the third person. But this reason is not always recognized; and in the case of a promise of indemnity there is a plain conflict of authority, as where A. promises B. that, if B. will be surety for X., A. will save B. harmless. Upon the foregoing reason the promise of A. should be in writing, where it is made solely for the accommodation of X. who will remain liable to B.<sup>98</sup> If the promise is made for a consideration of distinct benefit to the promisor, it need not be in writing.<sup>99</sup>

the cases on this point; *Watson v. Randall*, 20 Wend. (N. Y.) 201; *White v. Rintoul*, 108 N. Y. 222, 15 N. E. 318.

<sup>95</sup> *Mallory v. Gillett*, 21 N. Y. 412; *Wait v. Wait's Ex'r*, 28 Vt. 350; *Belknap v. Bender*, 75 N. Y. 446, 31 Am. Rep. 476; *First Nat. Bank of Sing Sing v. Chalmers*, 144 N. Y. 432, 39 N. E. 331; *Fehlinger v. Wood*, 134 Pa. 517, 19 Atl. 746; *Sext v. Geise*, 80 Ga. 698, 6 S. E. 174. But see *Gower v. Stuart*, 40 Mich. 747; *Frame v. August*, 88 Ill. 424.

<sup>96</sup> *Eastwood v. Kenyon*, 11 Adol. & E. 438; *Windell v. Hudson*, 102 Ind. 521, 2 N. E. 303; *Alger v. Scoville*, 1 Gray (Mass.) 391, 395.

<sup>97</sup> *Wilson v. Bevans*, 58 Ill. 232; *Clinton Nat. Bank v. Studemann*, 74 Iowa, 104, 37 N. W. 112; *Delp v. Bartholomay Brewing Co.*, 123 Pa. 42, 15 Atl. 871; *Bateman v. Butler*, 124 Ind. 223, 24 N. E. 989; *Price v. Reed*, 38 Mo. App. 489; *Hooper v. Hooper*, 32 W. Va. 526, 9 S. E. 937.

<sup>98</sup> *Hartley v. Sanford*, 66 N. J. Law, 627, 50 Atl. 454, 55 L. R. A. 206; *Nugent v. Wolfe*, 111 Pa. 471, 4 Atl. 15, 56 Am. Rep. 291; *Wolverton v. Davis*, 85 Va. 64, 6 S. E. 619, 17 Am. St. Rep. 56. See note 73, ante. Contra: *Aldrich v. Ames*, 9 Gray (Mass.) 76; *Chapin v. Merrill*, 4 Wend. (N. Y.) 657.

<sup>99</sup> *Tighe v. Morrison*, 116 N. Y. 263, 22 N. E. 164, 5 L. R. A. 617. And see *Hartley v. Sanford*, supra.

In jurisdictions where acceptances of bills of exchange are not required to be in writing, or the statutes do not otherwise modify the common law, parol acceptances, if assented to by the holder, are permitted.<sup>1</sup> Here the drawee merely assents to a promise made in his name by the drawer and becomes primarily liable. It is not a promise to pay the debt of another, even though made merely for the accommodation of the drawer.

A written guaranty given by a third party to a creditor, that his debtor will thereafter pay to him a pre-existing debt, must, notwithstanding the amendment of the statute of frauds in New York by Laws 1863, c. 464, expressly or by fair implication disclose that the promise rests on a legal consideration.<sup>2</sup> But upon this point there is much conflict.<sup>3</sup>

## PRINCIPLES OF CONSTRUCTION

7. (a) The liability of a surety or guarantor is *strictissimi juris*, and he is not to be held liable beyond the precise stipulations of his contract.<sup>4</sup>

This does not mean that a different rule must be applied in the construction of such contracts from that which is to be applied in the construction of contracts in general. Like all other contracts, they must be construed fairly and reasonably, and according to the intention of the parties. But when the meaning of the language used has been thus ascertained, the responsibility of the guarantor or surety is not to be extended or enlarged by implication or construction, and is *strictissimi juris*.<sup>5</sup>

Doubtless this oft-stated rule rests upon the same reason as that which moved the Legislature to require such contracts to be in writ-

<sup>1</sup> *Scudder v. Union Nat. Bank*, 91 U. S. 406, 23 L. Ed. 245; *Stockwell v. Bramble*, 3 Ind. 428; *Exchange Bank of St. Louis v. Rice*, 98 Mass. 288.

<sup>2</sup> *Barney v. Forbes*, 118 N. Y. 585, 23 N. E. 890; *Church v. Brown*, 21 N. Y. 331; *Drake v. Seaman*, 97 N. Y. 230.

<sup>3</sup> See *Clark, Cont.* (3d Ed.) p. 108. Perhaps the reason of the statute of frauds would be satisfied if a party could not be charged with any greater obligation than that which is expressed in the writing; but it is generally declared that the writing must contain all the terms of the contract. See *Clark, Cont.* (3d Ed.) p. 101 et seq.

<sup>4</sup> *Douglass v. Reynolds*, 7 Pet. 125, 8 L. Ed. 626; *Hopewell v. McGrew*, 50 Neb. 789, 70 N. W. 397; *Markland Min. & Mfg. Co. v. Kimmel*, 87 Ind. 560; *Brandt, S. & G.* (3d Ed.) § 106.

<sup>5</sup> *People v. Backus*, 117 N. Y. 196, 22 N. E. 759; *Northern Light Lodge No. 1, I. O. O. F., v. Kennedy*, 7 N. D. 146, 73 N. W. 524; *Locke v. McVean*, 33 Mich. 473; *Weiler v. Henarie*, 15 Or. 28, 13 Pac. 614.

ing.<sup>6</sup> It should have no application; therefore, where the surety contracts in consideration of a distinct benefit to himself.<sup>7</sup>

(b) If the phraseology of a contract of guaranty or suretyship is so ambiguous as not to furnish conclusive evidence of its meaning, light may be sought from the extrinsic circumstances.<sup>8</sup>

(c) If, as thus interpreted, the contract is still fairly open to different constructions, it is to be interpreted most strongly against the surety or guarantor, if it was he who adopted the phraseology.<sup>9</sup>

## LIABILITY OF SURETY OR GUARANTOR

### 8. WHEN DOES THE LIABILITY ARISE

The surety, being a debtor from the beginning, must see that the debt is paid, and his liability to pay the debt himself arises as soon as it is due. The guarantor is not liable until after the principal has failed to perform, and even then his obligation, at least theoretically, is not to pay the debt, but to answer for the consequences of the default. In a guaranty of collection, he is only liable after the appropriate means of collecting from the principal have been exhausted; while in a guaranty of payment his liability arises immediately upon default, subject, in certain cases elsewhere considered, to his right to have demand made upon the principal and notice of default given to himself.<sup>10</sup>

The prospective obligation, however, both of surety and guarantor, exists as soon as their contract is complete.<sup>11</sup>

<sup>6</sup> See note 73, ante.

<sup>7</sup> *City Trust, Safe Deposit & Surety Co. v. Lee*, 204 Ill. 69, 68 N. E. 485. See *Brandt, S. & G.* (3d Ed.) p. 236, and note.

<sup>8</sup> *Evansville Nat. Bank v. Kaufmann*, 93 N. Y. 281, 45 Am. Rep. 204.

<sup>9</sup> *Lawrence v. McCalmont*, 2 How. 426, 11 L. Ed. 326; *Hargreave v. Smee*, 6 Bing. 244; *Belloni v. Freeborn*, 63 N. Y. 388; *Smith v. Molleson*, 148 N. Y. 241, 42 N. E. 669.

<sup>10</sup> *Saint v. Wheeler & Wilson Manufacturing Co.*, 95 Ala. 371, 10 South. 539, 36 Am. St. Rep. 210; *McMurray v. Noyes*, 72 N. Y. 525, 28 Am. Rep. 180; *McMillan v. Bull's Head Bank*, 32 Ind. 13, 2 Am. Rep. 323. Compare *Campbell v. Sherman*, 151 Pa. 70, 25 Atl. 35, 31 Am. St. Rep. 735, and, as to the Pennsylvania cases, see *Walton v. Mascall*, 13 Mees. & W. (Hare & W. Am. Ed.) p. 72, note.

The liability of surety and guarantor of payment, or absolute guarantor, differ only in form. See *Brandt, S. & G.* (3d Ed.) § 110.

<sup>11</sup> *Davis Sewing Mach. Co. v. Richards*, 115 U. S. 527, 6 Sup. Ct. 173, 29 L. Ed. 480; *City Nat. Bank of Poughkeepsie v. Phelps*, 86 N. Y. 493; *Mussey v. Rayner*, 22 Pick. (Mass.) 223; *Kennaway v. Treleavan*, 5 Mees. & W. 498.

By the general rule of law, a covenant to indemnify against a future judgment, charge or liability is broken by the recovery of a judgment, or the fixing of a charge or liability in the matter to which the covenant relates. When the covenant is one of indemnity against the recovery of a judgment, the cause of action on the covenant is complete the moment the judgment is recovered, and an action for damages may be immediately maintained thereon, measured by the amount of the judgment; and this, although the judgment has not been paid by the covenantee, and although the covenantor was not a party, or had no notice of the former action. The covenantor, in an action on a covenant of general indemnity against judgments, is concluded, by the judgment recovered against the covenantee, from questioning the existence or extent of the covenantee's liability in the action in which it was rendered. The recovery of a judgment is the event against which he covenanted, and it would contravene the manifest intention and purpose of the indemnity to make the right of the covenantee to maintain an action on the covenant depend upon the result of the retrial of an issue which, as against the covenantee, had been conclusively determined in the former action; always, however, saving the right, as the law must in every case where the suit is between third persons to contest the proceeding, on the ground of fraudulent collusion, for the purpose of charging the surety. A judgment by default or on consent is also covered by the covenant, but in such cases is only presumptive evidence against the sureties.<sup>12</sup>

The cases relating to bonds conditioned on the faithful performance of duty by officials present certain peculiarities because of the fact that the statutes under which they are usually given vary in their terms. Accordingly, the bond may go into effect from its date, or upon delivery, or upon acceptance by the government, or otherwise as affected by special circumstances, or as specified or implied in the statutes governing a given case.<sup>13</sup>

And after the bond goes into effect, it may relate back to cover a period contemplated by its terms.<sup>14</sup>

<sup>12</sup> *Conner v. Reeves*, 103 N. Y. 527, 9 N. E. 439.

But ordinarily a surety is not bound by a judgment to which he was not a party and against which he was afforded no opportunity to defend. *Park v. Ensign*, 66 Kan. 50, 71 Pac. 230, 97 Am. St. Rep. 352; *Brandt, S. & G.* (3d Ed.) § 124.

<sup>13</sup> *Broome v. U. S.*, 15 How. 143, 14 L. Ed. 636; *U. S. v. Le Barron*, 19 How. 73, 15 L. Ed. 525; *Ætna Life Ins. Co. v. American Surety Co. (C. C.)* 34 Fed. 299; *Dawes v. Edes*, 13 Mass. 177; *Reilly v. Dodge*, 42 Hun (N. Y.) 646.

<sup>14</sup> *Ætna Life Ins. Co. v. American Surety Co.*, *supra*; *Dawes v. Edes*, *supra*; *Choate v. Arrington*, 116 Mass. 557.

*Negotiability and Assignability.* In considering the question of the transfer from one person to another of the benefit of a guaranty, or of rights arising therefrom, it is important to distinguish between negotiability and mere assignability. Negotiability is the peculiar characteristic of commercial paper, by virtue of which the indorsee before maturity and for value takes the thing transferred free from equities existing between the original parties. The term "assignment" relates to a transfer by which the transferee merely steps into the shoes of his transferor, and is thus affected by equities which might have been set up against the latter if no transfer had been made.<sup>15</sup>

As to the negotiability of guaranties indorsed on or referring to negotiable paper, the authorities are in some respects conflicting.<sup>16</sup>

(1) A guaranty of a negotiable promissory note, in general terms, if upon a separate paper, is not itself negotiable.<sup>17</sup>

(2) This rule applies both where the guaranty is made to a given individual by name, and where no guarantee is named, for in the latter case it is limited to the first person who thereafter takes the instrument guaranteed, in reliance upon the guaranty.<sup>18</sup>

(3) Where, before delivery, a general guaranty is indorsed upon negotiable paper by one not a party thereto, and naming no guarantee, it is held in some states that it does not partake of the negotiability of the paper guaranteed.<sup>19</sup>

Such a guaranty becomes fixed whenever any one takes it upon the guarantor's credit.<sup>20</sup>

But, where a note is guaranteed in general terms, there is a presumption that the plaintiff suing thereon, appearing to be the first and only holder for value, was the person to whom the guaranty was given or duly transferred.<sup>21</sup>

If the guaranty, though on a separate paper, is attached to the instrument guaranteed, the effect is the same as though it were indorsed thereon.<sup>22</sup>

<sup>15</sup> *Trust Co. v. Nat. Bank*, 101 U. S. 71, 25 L. Ed. 876. See Norton, B. & N. (4th Ed.) §§ 2-7.

<sup>16</sup> Daniel, *Neg. Inst.* §§ 1774-1784; Norton, B. & N. (4th Ed.) p. 177.

<sup>17</sup> *McLaren v. Watson's Ex'rs*, 26 Wend. (N. Y.) 430, 446, 37 Am. Dec. 260, affirming 19 Wend. (N. Y.) 557.

<sup>18</sup> *Id.*; Story, *Prom. Notes*, § 484.

<sup>19</sup> *Tinker v. McCauley*, 3 Mich. 188; *True v. Fuller*, 21 Pick. (Mass.) 140; *Sandford v. Norton*, 14 Vt. 228.

<sup>20</sup> *Nevins v. Bank of Lansingburgh*, 10 Mich. 547.

<sup>21</sup> *Northumberland County Bank v. Eyer*, 58 Pa. 103; *Cooper v. Dedrick*, 22 Barb. (N. Y.) 516; *Nevius v. Bank of Lansingburgh*, 10 Mich. 547. See *Taylor v. Binney*, 7 Mass. 481; *True v. Fuller*, 21 Pick. (Mass.) 142.

<sup>22</sup> *Everson v. Gere*, 122 N. Y. 292, 25 N. E. 492. The right of action upon the guaranty passes to the holder.

In other states it is held that a general guaranty upon the back of a negotiable instrument, specifying no person to whom the guarantor undertakes to be liable, runs with the instrument on which it is written and to which it refers, partakes of its character of negotiability, and any person having the legal interest in the principal instrument takes in like manner the incident and may sue upon the guaranty.<sup>23</sup>

(4) Where the holder of a negotiable note, in transferring it to another, indorses and signs a guaranty thereon, but does not otherwise indorse the note, it has been held that the guaranty does not inure to the benefit of any holder subsequent to the one taking from the guarantor, so as to enable him to sue the latter thereon, in the absence of proof of any subsequent privity.<sup>24</sup> But of course the immediate transferee for whose benefit the guaranty is given may sue upon it.<sup>25</sup>

(5) Passing from the question of negotiability to that of assignability, the principle in equity is that, in any case of a guaranty upon or accompanying negotiable paper, the holder of the paper may assign his right with the paper guaranteed, so that the assignee may sue in the name of the original guarantee.<sup>26</sup>

In New York it is settled that a special guaranty, limited to the person to whom it is addressed, and contemplating a trust or reposing a confidence in such person, is not assignable until a cause of action has arisen thereon.<sup>27</sup> Thereafter, by virtue of the statute relating to actions by the real party in interest, the assignee of the cause of action may now sue thereon in his own name.<sup>28</sup>

<sup>23</sup> *Commercial Bank v. Cheshire Provident Inst.*, 59 Kan. 361, 53 Pac. 131, 41 L. R. A. 175, 68 Am. St. Rep. 368; *Webster v. Cobb*, 17 Ill. 466; *Partridge v. Davis*, 20 Vt. 499. See *Watson's Ex'rs v. McLaren*, 19 Wend. (N. Y.) 557. *Pars. Notes & B.* p. 132, says that though strong opinions, resting on strong arguments, have been expressed in favor of the doctrine that the negotiability of paper guaranteed attaches to the contract of guaranty which is indorsed upon it, the weight of authority is opposed to this view.

The prevailing view appears to be that while the right of action passes to the transferee, he takes subject to the equities. *Norton, B. & N.* (4th Ed.) p. 178. *Contra: Webster v. Cobb*, 17 Ill. 466.

<sup>24</sup> *Taylor v. Binney*, 7 Mass. 481. See *Trust Co. v. National Bank*, 101 U. S. 70, 25 L. Ed. 876. *Contra, Phelps v. Church*, 65 Mich. 232, 32 N. W. 30; *Cooper v. Dedrick*, 22 Barb. (N. Y.) 516; *Partridge v. Davis*, 20 Vt. 499; *Benton v. Fletcher*, 31 Vt. 418; *Judson v. Gookwin*, 37 Ill. 286.

Such a guarantee held equivalent to indorsement. *First Nat. B'k v. Shaw*, 157 Mich. 192, 121 N. W. 809, 133 Am. St. Rep. 342; *Mullen v. Jones*, 102 Minn. 72, 112 N. W. 1048.

<sup>25</sup> *Brown v. Curtiss*, 2 N. Y. 225. And see *Upham v. Prince*, 12 Mass. 14; *Barrett v. May*, 2 Bailey (S. C.) 1.

<sup>26</sup> 2 *Daniel*, Neg. Inst. 1775; *Story, Bills*, 457.

<sup>27</sup> *Evansville Nat. Bank v. Kaufmann*, 93 N. Y. 273, 45 Am. Rep. 204; *Bennett v. Draper*, 139 N. Y. 266, 34 N. E. 791.

<sup>28</sup> *Evansville Nat. Bank v. Kaufmann*, *supra*.

But where, as in the case of a guaranty of a promissory note previously executed and delivered, the amount and time of payment of which are fixed, the guarantor undertakes to pay it if the maker does not, it makes no difference to the guarantor whether he pays it to the payee, or to some one else to whom the latter transfers his claim, and the latter may sue in his own name.<sup>29</sup>

The fact that a guaranty is in terms negotiable makes the guaranty pass with the instrument, and vests whomsoever may hold the note with right to sue upon it, but this does not change its character of a guaranty;<sup>30</sup> and accordingly, being a guaranty, the debtor must seek the creditor, and the guarantor is entitled to no notice of the failure of the maker or acceptor to pay the instrument,<sup>31</sup> though this may be varied by the particular terms of given guaranties.<sup>32</sup>

Under the statutes declaring only bills and notes to be negotiable, a guarantor of coupons on railroad bonds, though the guaranty is available as such to a transferee of the principal instruments, may make any defense that he could have made if sued by the original payee in the bonds.<sup>33</sup>

## 9. EXTENT OF LIABILITY

The liability of a surety or guarantor is not to be extended beyond the terms of his contract, properly construed. To the extent, and in the manner, and under the circumstances prescribed in his obligation, he is bound, but no further.

He has a right to stand upon the precise terms of his contract. And if there be a default, or breach of condition, his liability must be determined by the terms of the contract, which cannot be extended by construction or implication to cover a case not within its provisions.<sup>34</sup>

<sup>29</sup> *Everson v. Gere*, 122 N. Y. 290, 25 N. E. 492. Compare *Lamourieux v. Hewit*, 5 Wend. (N. Y.) 307.

<sup>30</sup> *Allen v. Rightmere*, 20 Johns. (N. Y.) 365, 11 Am. Dec. 288; *Ketchell v. Burns*, 24 Wend. (N. Y.) 456. Compare *Story, Prom. Notes*, § 484; *Palmer v. Grant*, 4 Conn. 389.

<sup>31</sup> *Allen v. Rightmere*, 20 Johns. (N. Y.) 365, 11 Am. Dec. 288; *Walton v. Mascall*, 13 Mees. & W. 72.

<sup>32</sup> *Arents v. Com.*, 18 Grat. (Va.) 770.

<sup>33</sup> *Eastern Townships Bank v. St. Johnsbury & L. C. R. Co.* (C. C.) 40 Fed. 423.

<sup>34</sup> *United States Fidelity & Guaranty Co. v. French Mut. General Soc. of Mut. Ins. Against Theft*, 212 Fed. 620, 129 C. C. A. 156; *Adrianse, Platt & Co. v. Kelley*, 171 App. Div. 213, 156 N. Y. Supp. 1013; *Cushing v. Cable*, 48 Minn. 3, 50 N. W. 891; *Peru Plow & Wheel Co. v. Ward*, 1 Kan. App. 6, 41 Pac. 64; *Miller v. Stewart*, 9 Wheat. 681, 6 L. Ed. 189; *Flynn v. Mudd*, 27 Ill. 323; *Chase v. McDonald*, 7 Har. & J. (Md.) 160; *Noyes v. Granger*, 51 Iowa, 227, 1 N. W. 519; *Ludlow v. Simond*, 2 Caines, Cas. (N. Y.) 1, 2 Am. Dec. 291; *U. S. v. Boecker*, 21 Wall. 652, 22 L. Ed. 472.



If a surety is sued upon the old agreement, to which alone his undertaking was accessory, he has only to show that that has ceased to exist, and no longer binds his principal; and, if he is sued upon the substituted agreement, he is entitled, both in law and equity, to make the short and conclusive answer, "*Non hæc in foedera veni.*"<sup>35</sup>

A surety for an official holding office for a period fixed by statute is generally only liable for that period.<sup>36</sup>

Where a bond given by a surety for himself and his administrators, to secure the due discharge of his trust by a bank cashier, was conditional upon such performance during his entire employment, whether under his present or any subsequent election, and whether under the bank's present charter or any renewals or extensions thereof, the surety was held liable, though the breach of duty by the cashier occurred while he thereafter held office, without the formal re-election, as required by statute.<sup>37</sup>

But a bond to secure the faithful performance of official duties by a third person in a specified capacity does not render the surety liable for his default in the duties of a distinct office to which he is subsequently appointed.<sup>38</sup>

The sureties of a city clerk are not responsible for his misappropriation of public moneys paid to him which should have been paid to another official.<sup>39</sup>

If a register of deeds, during the term for which a bond has been given to secure the faithful performance of all the duties of his office, is by statute subjected to liability for damages to individuals injured by his failure to index instruments, the sureties are also liable;<sup>40</sup> and

<sup>35</sup> *Ide v. Churchill*, 14 Ohio St. 372; *Mayhew v. Boyd*, 5 Md. 102, 59 Am. Dec. 101; *Bacon v. Chesney*, 1 Starkie, 192; *Peru Plow & Wheel Co. v. Ward*, 1 Kan. App. 6, 41 Pac. 64; *Paine v. Jones*, 76 N. Y. 274; *Coburn v. Webb*, 56 Ind. 96, 26 Am. Rep. 15.

<sup>36</sup> *Board of Adm'rs v. McKowen*, 48 La. Ann. 251, 19 South. 553, 55 Am. St. Rep. 275; *Hassell v. Long*, 2 Maule & S. 363; *Mayor, etc., of Wilmington v. Horn*, 2 Har. (Del.) 190.

But see, further, as to the question of liability while the official holds over pending the appointment of a successor, *Baker City v. Murphy*, 30 Or. 405, 42 Pac. 133, 35 L. R. A. 88; *Eddy v. Kincaid*, 28 Or. 537, 41 Pac. 156, 655.

<sup>37</sup> *Shackamaxon Bank v. Yard*, 143 Pa. 129, 22 Atl. 908, 24 Am. St. Rep. 521; *Id.*, 150 Pa. 351, 24 Atl. 635, 30 Am. St. Rep. 807.

<sup>38</sup> *National Mechanics' Banking Ass'n v. Conkling*, 90 N. Y. 120, 42 Am. Rep. 405, note.

<sup>39</sup> *Orton v. City of Lincoln*, 156 Ill. 499, 41 N. E. 159; *San Luis Obispo County v. Farnum*, 108 Cal. 562, 41 Pac. 445; *Lowe v. City of Guthrie*, 4 Okl. 287, 44 Pac. 198. Compare *Campbell v. People*, 154 Ill. 595, 39 N. E. 578; *Spindler v. People*, 154 Ill. 637, 39 N. E. 580.

<sup>40</sup> *State v. Grizzard*, 117 N. C. 105, 23 S. E. 93.

sureties on an official bond may be liable for various torts of the principal, in so far as they constitute a breach of his official duty.<sup>41</sup>

But the sureties of an official are not liable for his misfeasance occurring entirely during a term of office prior to that covered by their bond;<sup>42</sup> but are liable for his failure to account, during the latter term, for moneys received during the prior term,<sup>43</sup> as well as for his misappropriation of funds during the term covered by the bond, though effected for the purpose of covering a defalcation committed during the prior term;<sup>44</sup> and the sureties on the new bond of an official who succeeds himself are liable for his misappropriation or failure to account, during that term, for funds remaining in his hands when the prior term ended.<sup>45</sup>

The terms of an official bond may be such as not to render the sureties liable for disbursements erroneously made by the official, if actually made in good faith and for the benefit of the government.<sup>46</sup>

The terms of a given contract of suretyship or guaranty may be such as to cover a wider field than the usual one. Thus, where a bond was given to a bank, conditioned upon the faithful and honest performance by the cashier of all his duties during his term of office, and he converted funds of the bank to his own use, and engaged in a conspiracy to defraud the bank, by which the latter lost funds belonging to it, it was held that the fact that the bank had failed to provide an "exchange committee," as required by its by-laws, and that in the absence of such a committee the cashier had exclusive authority to transact the business of the bank, would not relieve the sureties, nor would the fact that his salary had been increased in consideration of his performing other duties not affecting the continuance of his full duties as cashier, if the losses in question occurred because of his breach of duty as cashier.<sup>47</sup>

And a surety for a contractor is not discharged from liability although his position has been altered by the conduct of the employer, where that conduct has been caused by a fraudulent act or omission

<sup>41</sup> *Rischer v. Meehan*, 11 Ohio Cir. Ct. R. 403; *Stephenson v. Sinclair*, 14 Tex. Civ. App. 133, 36 S. W. 137. Compare *Marquis v. Willard*, 12 Wash. 528, 41 Pac. 889, 50 Am. St. Rep. 906.

<sup>42</sup> *Bogardus v. People to Use of Ford County*, 52 Ill. App. 179.

<sup>43</sup> *U. S. v. Dudley*, 21 D. C. 337.

<sup>44</sup> *People v. Hammond*, 109 Cal. 384, 42 Pac. 36.

<sup>45</sup> *Trustees of Schools v. Arnold*, 58 Ill. App. 103.

<sup>46</sup> *U. S. v. McClane (C. C.)* 74 Fed. 153.

<sup>47</sup> *Wallace v. Exchange Bank of Spencer*, 126 Ind. 265, 26 N. E. 175; *Shackamaxon Bank v. Yard*, 150 Pa. 351, 24 Atl. 635, 30 Am. St. Rep. 807. Compare *American Tel. Co. v. Lennig*, 139 Pa. 594, 21 Atl. 162.

of the contractor, against which the surety has, by the contract of suretyship, guaranteed the employer.<sup>48</sup>

The liability of a guarantor under a continuing guaranty remains in operation, in respect to advances, credits, etc., made during the entire period covered thereby, if any time limit or other condition is named, either expressly or by implication, or otherwise, until revocation, in cases where the guaranty may be revoked.<sup>49</sup>

Inasmuch as a contract of suretyship or guaranty may, as elsewhere stated, be general or special, assignable or nonassignable, negotiable or nonnegotiable, the persons in favor of whom a given contract may operate are different in these different classes of cases. The surety or guarantor may restrict his obligation to specified persons, or extend it to any person whatever who may act upon it, or to those who shall first act upon it, or to any person in a specified class; and the only difficulty in given cases is to ascertain what was intended by the terms of his contract, subject to certain restrictive principles as to assignability and negotiability,—topics which are considered below.<sup>50</sup>

A guaranty may be given to specified persons, expressly or by implication on behalf of others; and in such a case the former may sue, though it was the latter who made advances or otherwise incurred obligations or liabilities on the faith of the guaranty.<sup>51</sup>

A guaranty to secure credit is terminated, as to future credits, by the insolvency of the person credited, of which the creditor has notice.<sup>52</sup>

If a guaranty is given with the purpose of securing a partnership, the fact that it was in form addressed to one of the members, under whose name the firm did business, does not prevent their availing themselves of it;<sup>53</sup> though it is otherwise where the guarantor does not know that it is a firm that proposes to rely on the guaranty, and he proposes to guaranty only the individual to whom the guaranty runs.<sup>54</sup>

<sup>48</sup> *Mayor, etc., of Kingston-upon-Hull v. Harding*, [1892] 2 Q. B. 494.

As to the liability of sureties on statutory undertakings to secure a stay on appeal, see *Foo Long v. American Surety Co.*, 146 N. Y. 251, 40 N. E. 730.

<sup>49</sup> *Burch v. De Rivera*, 53 Hun, 367, 6 N. Y. Supp. 206.

<sup>50</sup> *Evansville Nat. Bank v. Kaufmann*, 93 N. Y. 277, 279, 45 Am. Rep. 204; *Lowry v. Adams*, 22 Vt. 160; *Robbins v. Bingham*, 4 Johns. (N. Y.) 476; *Union Bank of Louisiana v. Coster's Ex'rs*, 3 N. Y. 214, 53 Am. Dec. 280.

<sup>51</sup> *Lloyd's v. Harper*, 16 Ch. Div. 290.

<sup>52</sup> *Lennox v. Murphy*, 171 Mass. 370, 50 N. E. 644.

<sup>53</sup> *Beakes v. Da Cunha*, 126 N. Y. 293, 27 N. E. 251.

<sup>54</sup> *Barns v. Barrow*, 61 N. Y. 39, 19 Am. Rep. 247; *Lord Arlington v. Merricke*, 2 Saund. 414; *Wright v. Russell*, 2 Wm. Blackstone, 934; *Meyers v. Edge*, 7 Term R. 254; *Holmes v. Small*, 157 Mass. 223, 32 N. E. 3.

In the absence of language, in a guaranty given to a firm, showing that the parties intended that it should survive changes in the partnership, and inure to the benefit of a new firm, as well as the old, it terminates with the existence of the firm to which it was given.<sup>55</sup>

But loans on advances made by the old firm on the faith of the guaranty could be assigned to the new firm, and such assignment would carry with it a right of action on the guaranty.<sup>56</sup>

And the fact that a guaranty addressed to a firm is a continuing one does not operate to continue it after the membership of the firm changes.<sup>57</sup>

## RIGHTS OF THE SURETY OR GUARANTOR

10. (a) *As Against the Principal.* After the debt is due, and the surety or guarantor has paid the same, his right of action arises against the principal without demand for what he has thus paid, with interest and costs.<sup>58</sup>

The surety or guarantor may also, by special agreement, have other means of indemnifying himself, as by enforcing securities given to secure him against loss,<sup>59</sup> and is not debarred from becoming a purchaser at sheriff's sale of the property of the principal.<sup>60</sup> He may also seek the aid of equity for reimbursement.<sup>61</sup>

And because the surety has no interest in the contract of his principal, he may, in a proper case, proceed in a court of equity against the principal to compel him to pay the debt.<sup>62</sup>

If a surety or guarantor, after the debt has become due, has any apprehension of loss or injury from the delay of the creditor to en-

<sup>55</sup> *Bennett v. Draper*, 139 N. Y. 270, 34 N. E. 791; *Strange v. Lee*, 3 East, 489; *Add. Cont.* 655.

<sup>56</sup> *Bennett v. Draper*, *supra*.

<sup>57</sup> *Burch v. De Rivera*, 53 Hun, 367, 6 N. Y. Supp. 206.

<sup>58</sup> *Collins v. Boyd*, 14 Ala. 505; *Harper's Adm'r v. McVeigh's Adm'r*, 82 Va. 751, 1 S. E. 193; *Tillotson v. Rose*, 11 Metc. (Mass.) 299; *Eaton v. Lambert*, 1 Neb. 339; *Ward v. Henry*, 5 Conn. 595, 13 Am. Dec. 119; *Coggeshall v. Rugles*, 62 Ill. 401; *Bushong v. Taylor*, 82 Mo. 670; *Cranmer v. McSwords*, 26 W. Va. 417; *Cooper v. Jewett*, 233 Fed. 618, 147 C. C. A. 426; *Jennings v. Wall*, 217 Mass. 278, 104 N. E. 738.

<sup>59</sup> *West v. Hayes*, 117 Ind. 290, 20 N. E. 155; *Lewis, Hubbard & Co. v. Toney*, 76 W. Va. 80, 85 S. E. 30.

<sup>60</sup> *Mathis v. Stufflebeam*, 94 Ill. 487.

<sup>61</sup> *Bisph. Eq.* § 331.

<sup>62</sup> 1 Story, *Eq. Jur.* § 327; *Bishop v. Day*, 13 Vt. 81, 37 Am. Dec. 582; *Harris v. Newell*, 42 Wis. 691; *Hays v. Ward*, 4 Johns. Ch. (N. Y.) 123, 8 Am. Dec. 554; *Southwestern Surety Ins. Co. v. Wells* (D. C.) 217 Fed. 294; *Cotting v. Otis Elevator Co.*, 214 Mass. 294, 101 N. E. 367.

force the debt against the principal debtor, he may proceed in equity to compel the debtor to discharge the debt or other obligation for which the surety is responsible.<sup>63</sup>

(b) *As Against the Creditor.* A surety, if compelled to pay the principal's debt, is entitled to stand in the creditor's place, and to enforce the same remedies and avail himself of all securities held by the creditor.<sup>64</sup>

At law the surety is liable to pay the debt, though the creditor holds securities; but in equity, if no injury would result to the creditor and otherwise might result to the surety, the latter may require the creditor to first resort to his securities before coming to the surety.<sup>65</sup>

But subrogation is a matter of grace, not of right, and is a creature of pure equity. It will never be decreed where it works injustice.<sup>66</sup>

As a general proposition, it is no defense to an action against a surety or guarantor that the creditor has other securities, and the defendant has no right to ask an assignment thereof to himself prior to his payment of the creditor's demand.<sup>67</sup>

It has been held in some cases that a guarantor or surety, when sued at law by the creditor, cannot avail himself, in exoneration of his liability, of a cause of action for damages for a breach of the contract existing in favor of the principal;<sup>68</sup> but he may do so in equity, where both principal and creditors are parties, and according to some authorities even at law.<sup>69</sup>

Conversely, securities belonging to the principal debtor, and pledged by him to indemnify his surety, inure to the benefit of the creditor.<sup>70</sup>

Grave doubts were for a time entertained as to the right of a surety,

<sup>63</sup> Story, Eq. Jur. § 849; Norton v. Reid, 11 S. C. 593; Watson v. Barr, 37 S. C. 463, 16 S. E. 188; Philadelphia & R. R. Co. v. Little, 41 N. J. Eq. 519, 7 Atl. 356; Gibbs v. Mennard, 6 Paige (N. Y.) 258; Hannay v. Pell, 3 E. D. Smith (N. Y.) 432.

<sup>64</sup> Hays v. Ward, 4 Johns. Ch. (N. Y.) 130; Kidd v. Hurley, 54 N. J. Eq. 179, 33 Atl. 1057; Schroepell v. Shaw, 3 N. Y. 457. See Brandt, S. & G. (3d Ed.) § 324.

<sup>65</sup> Kidd v. Hurley, 54 N. J. Eq. 180, 33 Atl. 1057; Irick v. Black, 17 N. J. Eq. 195. See Brandt, S. & G. (3d Ed.) § 260.

<sup>66</sup> Budd v. Olver, 148 Pa. 194, 23 Atl. 1105; Prairie State Nat. Bank v. U. S., 164 U. S. 231, 17 Sup. Ct. 142, 41 L. Ed. 412; Gadsden v. Brown, Speer, Eq. (S. C.) 41.

<sup>67</sup> Lumbermen's Ins. Co. v. Sprague, 59 Minn. 208, 60 N. W. 1101.

<sup>68</sup> Newton v. Lee, 139 N. Y. 332, 34 N. E. 905; Elliott v. Brady, 192 N. Y. 221, 85 N. E. 69, 18 L. R. A. (N. S.) 600, 127 Am. St. Rep. 898.

<sup>69</sup> Brandt, S. & G. (3d Ed.) § 259; Andrews v. Varrell, 46 N. H. 17.

<sup>70</sup> Meyers v. Campbell, 59 N. J. Law, 378, 35 Atl. 788; Eastman v. Foster, 8 Metc. (Mass.) 19; Rice v. Dewey, 13 Gray (Mass.) 47; Russell v. Clark, 7 Cranch, 69, 3 L. Ed. 271; Evertson v. Booth, 19 Johns. (N. Y.) 486; Keller v. Ashford, 133 U. S. 622, 10 Sup. Ct. 494, 33 L. Ed. 667.

by suit in equity, to require the creditor to prosecute his demand against the principal.<sup>71</sup>

But the right is now recognized in appropriate cases, the surety being required, however, to indemnify the creditor against loss by a fruitless suit.<sup>72</sup>

There are cases where, apart from this right in equity, the surety or guarantor, in case of default by the principal, is entitled to notify the creditor to proceed against the principal, at the peril of otherwise releasing the surety or guarantor to the extent of any injury resulting from the failure to comply. This is the view adopted in some jurisdictions; <sup>73</sup> while in others the right is denied.<sup>74</sup>

And, even where the general right of the surety or guarantor to notify the creditor to proceed against the principal is upheld, the courts have not been disposed to apply this doctrine, except where the surety became such at the inception of the contract, or that relation was created by dealings between the parties originally bound by the contract, subsequent thereto, of which the creditor had notice.<sup>75</sup>

But the nature of the given contract of suretyship or guaranty, and its terms, and other special circumstances, may vary the result that would otherwise follow.<sup>76</sup>

It is not extended to engagements which, though collateral in form, were entered into for the benefit of the surety or guarantor subsequent to the original transaction, and upon a new and independent consideration; <sup>77</sup> nor to cases where the very purpose of the guaranty is to avoid the necessity of the creditor's resorting to his ordinary remedies against the principal.<sup>78</sup>

<sup>71</sup> *Wright v. Simpson*, 6 Ves. 714.

<sup>72</sup> *In re Babcock*, 3 Story, 393, Fed. Cas. No. 696; *Thompson v. Taylor*, 72 N. Y. 32; *Huey v. Pinney*, 5 Minn. 310 (Gil. 246); *Irick v. Black*, 17 N. J. Eq. 189; *Des Moines Bridge, etc., Works v. Plane*, 163 Iowa, 18, 143 N. W. 866; *Comstock v. Corbin*, 191 Mich. 639, 158 N. W. 106; *Patch & Co. v. First Nat. Bank (Vt.)* 96 Atl. 423.

<sup>73</sup> *King v. Baldwin*, 17 Johns. (N. Y.) 384, 8 Am. Dec. 415; *Pain v. Packard*, 13 Johns. (N. Y.) 174, 7 Am. Dec. 369; *Remsen v. Beekman*, 25 N. Y. 552; *Colgrove v. Tallman*, 67 N. Y. 95, 23 Am. Rep. 90; *Harriman v. Egbert*, 36 Iowa, 270. See *Cohn v. Spitzer*, 145 App. Div. 104, 129 N. Y. Supp. 104.

<sup>74</sup> *Frye v. Barker*, 4 Pick. (Mass.) 382; *May v. Reed*, 125 Ind. 199, 25 N. E. 216; *Thompson v. Bowne*, 39 N. J. Law, 3; *Taylor v. Beck*, 13 Ill. 376. See *Brandt, S. & G.* (3d Ed.) § 262 et seq.

<sup>75</sup> *Newcomb v. Hale*, 90 N. Y. 326, 43 Am. Rep. 173; *Trimble v. Thorne*, 16 Johns. (N. Y.) 152, 8 Am. Dec. 302; *Colgrove v. Tallman*, 67 N. Y. 95, 23 Am. Rep. 90; *Remsen v. Beekman*, 25 N. Y. 552.

<sup>76</sup> *Gage v. Mechanics' Nat. Bank of Chicago*, 79 Ill. 62.

<sup>77</sup> *Wells v. Mann*, 45 N. Y. 327, 6 Am. Rep. 93.

<sup>78</sup> *Snow v. Horgan*, 18 R. I. 289, 27 Atl. 338.

*Demand and Notice of Default.* A surety, in the strict sense, as distinguished from a guarantor, is not, as a general proposition, entitled to have a demand made on the principal, or to notice of his default; being himself a debtor from the beginning, and so liable to see that the debt is paid. But the contract may provide otherwise.<sup>79</sup>

And the same principle applies to a guarantor where he is liable immediately upon default.<sup>80</sup>

On the other hand, the right of a mere guarantor, in the absence of special circumstances or special agreement, to have demand made on the principal, or to receive notice of default, is viewed in different lights in different jurisdictions.<sup>81</sup> In New York, and generally, a guarantor is not, in general, entitled to notice;<sup>82</sup> and, even where notice is in terms required, it may not be a condition precedent.<sup>83</sup> If a guaranty is given to secure performance by the principal upon demand, such a demand is a condition precedent to his liability.<sup>84</sup>

And where a continuing guaranty is given to secure the faithful performance of duty by an official or an employé, and is in its nature revocable, the guarantor is entitled to notice of a default involving moral turpitude, so that he may, if he chooses, terminate his further liability,<sup>85</sup> but is not entitled to have the employé discharged, or to receive notice in case of a mere default in a contract obligation.<sup>86</sup>

Even where it would not otherwise be called for notice of default may be specially required as a condition precedent to the liability of a surety or guarantor.<sup>87</sup> If notice of default would result in no benefit whatever to the guarantor, as where the principal was insolvent when the guaranty was given, and so remained, failure to give notice is no

<sup>79</sup> *McMillan v. Bull's Head Bank*, 32 Ind. 13, 2 Am. Rep. 323; *Page v. White Sewing Machine Co.*, 12 Tex. Civ. App. 327, 34 S. W. 988; *Douglass v. Reynolds*, 7 Pet. 113, 8 L. Ed. 626; *Carr v. Card*, 34 Mo. 513; *Redfield v. Haight*, 27 Conn. 37; *Watson v. Barr*, 37 S. C. 463, 16 S. E. 188; *Carpenter v. Furrey*, 128 Cal. 665, 61 Pac. 369. See *Bingham v. National Brick & Clay Co.*, 66 Or. 113, 133 Pac. 1187.

<sup>80</sup> *Carr v. Card*, 34 Mo. 513; *Brandt, S. & G.* (3d Ed.) § 220. See p. 284, ante. See, generally, as to when demand and notice necessary, *Brandt*, § 218 et seq.

<sup>81</sup> See references in prior note, and 20 Cyc. p. 1450.

<sup>82</sup> *Barhydt v. Ellis*, 45 N. Y. 110; *Brown v. Curtiss*, 2 N. Y. 225.

<sup>83</sup> *Barhydt v. Ellis*, supra; *Franco-American Hygiene Co. v. Chladlek*, 195 Ill. App. 443.

<sup>84</sup> *Ewen v. Wilbor*, 70 Ill. App. 153; *Redfield v. Haight*, 27 Conn. 37; *Dole v. Young*, 24 Pick. (Mass.) 250.

<sup>85</sup> *Ætna Ins. Co. v. Fowler*, 108 Mich. 557, 66 N. W. 470.

<sup>86</sup> *Manchester Fire Assur. Co. v. Redfield*, 69 Minn. 10, 71 N. W. 709; *Lancashire Ins. Co. v. Callahan*, 68 Minn. 277, 71 N. W. 261, 64 Am. St. Rep. 475.

<sup>87</sup> *Waldheim v. Sonnenstrahl*, 8 Misc. Rep. 219, 28 N. Y. Supp. 582; *Davis v. Wells, Fargo & Co.*, 104 U. S. 170, 26 L. Ed. 686; *Barhydt v. Ellis*, 45 N. Y. 110.

defense to the guarantor.<sup>88</sup> And the same principle has been applied where the principal is insolvent at the maturity of the debt,<sup>89</sup> and to cases where, from the circumstances, the guarantor must know all that a notice would tell him.<sup>90</sup>

And, in general, even where a notice is requisite under a continuing guaranty, notice of the amounts due, given within a reasonable time after all transactions with the principal are closed, is sufficient, and, if no injury results, an entire omission of notice is immaterial.<sup>91</sup>

Notice of default may be waived;<sup>92</sup> and the relation of the sureties or guarantors may be such in regard to a transaction as to make the principal their agent in respect to the default, and so dispense with notice.<sup>93</sup>

(c) *As Against Cosureties and Coguarantors.* One of several sureties or guarantors who is obliged to and does pay the creditor is thereupon entitled to contribution from the others.<sup>94</sup> And the mere fact that they were bound by different instruments is immaterial;<sup>95</sup> as is also the fact that the one who pays did not then know that there were cosureties.<sup>96</sup> And, as between two or more sureties, one who pays is entitled to the benefit of securities held by another.<sup>97</sup>

But contribution does not rest upon contract, but on the broad, equitable principle that equality is equity. Justice and fair dealing demand that where two or more parties sign the same obligation, and become obligated in precisely the same degree thereby, and stand upon the same footing as to their liabilities thereunder, one of the number shall not be compelled to assume the whole burden for his associates,

<sup>88</sup> *Taussig v. Reid*, 145 Ill. 495, 32 N. E. 918, 36 Am. St. Rep. 504; *Gibbs v. Cannon*, 9 Serg. & R. (Pa.) 198, 11 Am. Dec. 699.

<sup>89</sup> *Sullivan v. Field*, 118 N. C. 358, 24 S. E. 735.

<sup>90</sup> *Cooper v. Page*, 24 Me. 75, 41 Am. Dec. 371; *Williams v. Granger*, 4 Day (Conn.) 444; *Milroy v. Quinn*, 69 Ind. 411, 35 Am. Rep. 227.

<sup>91</sup> *Ferst v. Blackwell*, 39 Fla. 621, 22 South. 892; *Stevens v. Gibson*, 69 Vt. 142, 37 Atl. 244.

Burden to show damage on guarantor. *Hughes v. Heyman*, 4 App. D. C. 444; *Heeringa v. Ortlepp*, 167 Ill. App. 586; *Walrath v. Andersen*, 191 Ill. App. 551; *Stanley v. Stanley*, 112 Ind. 143, 13 N. E. 261.

<sup>92</sup> *Page v. White Sewing Machine Co.*, 12 Tex. Civ. App. 327, 34 S. W. 988.

<sup>93</sup> *Jungk v. Reed*, 12 Utah, 196, 42 Pac. 292.

<sup>94</sup> *Lansdale's Adm'rs v. Cox*, 7 T. B. Mon. (Ky.) 401; *Woodworth v. Bowes*, 5 Ind. 276; *Brandt, S. & G.* (3d Ed.) § 279.

<sup>95</sup> *Deering v. Earl of Winchelsea*, 2 Bos. & P. 270; *Rosenbaum v. Goodman*, 78 Va. 121; *Brandt, S. & G.* (3d Ed.) § 281.

<sup>96</sup> *Warner v. Morrison*, 3 Allen (Mass.) 566. *Brandt*, § 284.

<sup>97</sup> *Silvey v. Dowell*, 53 Ill. 260; *Agnew v. Bell*, 4 Watts (Pa.) 31; *Currier v. Fellows*, 27 N. H. 366. *Brandt, S. & G.* (3d Ed.) § 294.



but may compel them to share equally with him any loss that may occur as the result of their common liability.<sup>98</sup>

Parol evidence is therefore admissible to show that apparent principals are sureties, or vice versa.<sup>99</sup>

"If the sureties are not bound for the same thing, or do not occupy towards each other the same relative position, then one of these results may follow: (1) The surety paying the debt may have no right to contribution; (2) a surety first in point of time may have no remedy against one who is subsequent; (3) or a subsequent surety may have no remedy against the first."<sup>1</sup>

Thus, if one signs as surety for one who is himself a surety, he is not liable for contribution to the latter.<sup>2</sup>

And if a note signed by a principal and two sureties is discharged by the execution and delivery of a new note executed by the principal and one of those sureties, and the latter is forced to pay the last note, he is not entitled to contribution from his cosurety on the first note.<sup>3</sup>

While a mere voluntary payment by a surety or guarantor, which could not have been compelled, gives him no right to reimbursement from the principal nor to contribution from cosureties or coguarantors,<sup>4</sup> yet it is not necessary for him, in order to recover, to show that he was compelled to pay by execution. When the principal contract has been broken, he may pay without suit, and recover the amount of his principal,<sup>5</sup> and by analogy is entitled to contribution.<sup>6</sup>

*Death of Cosurety.* While, as above stated, the right to contribution originated in equitable principles, yet it has been grafted upon the law, with the aid of an implied promise to secure the legal remedy. It follows, therefore, that the death of one of two or more sureties or guarantors does not relieve his estate from the liability to contribute under

<sup>98</sup> *Bulkeley v. House*, 62 Conn. 459, 26 Atl. 352, 21 L. R. A. 247.

<sup>99</sup> *Robison v. Lyle*, 10 Barb. (N. Y.) 512; *Barry v. Ransom*, 12 N. Y. 462; *Apgar's Adm'rs v. Hiler*, 24 N. J. Law, 815; *Mansfield v. Edwards*, 136 Mass. 15, 49 Am. Rep. 1.

<sup>1</sup> *Bulkeley v. House*, 62 Conn. 459, 26 Atl. 352, 21 L. R. A. 247; *Bisp. Eq.* 308; *Harris v. Warner*, 13 Wend. (N. Y.) 402; *Paul v. Berry*, 78 Ill. 158; *Sayles v. Sims*, 73 N. Y. 552; *Oldham v. Broom*, 28 Ohio St. 53; *Sherman v. Black*, 49 Vt. 198; *Brandt, S. & G.* (3d Ed.) § 283 et seq.

<sup>2</sup> *Robertson v. Deatherage*, 82 Ill. 511.

<sup>3</sup> *Chapman v. Garber*, 46 Neb. 16, 64 N. W. 362; *Bell v. Boyd*, 76 Tex. 133, 13 S. W. 232.

<sup>4</sup> *Suppiger v. Garrels*, 20 Ill. App. 629; *Hough v. Ætna Ins. Co.*, 57 Ill. 318, 11 Am. Rep. 18; *Bradley v. Burwell*, 3 Denio (N. Y.) 69.

<sup>5</sup> *Mauri v. Heffernan*, 13 Johns. (N. Y.) 58.

<sup>6</sup> *Bradley v. Burwell*, *supra*.

their implied contract to that effect, originating when they executed the original undertaking,<sup>7</sup> even though the default by the principal was subsequent to the death of the cosurety.<sup>8</sup>

In this respect the mutual obligation to contribute is like any other contract made by one in his lifetime to pay money at a future time, either absolutely or contingently, who dies before the occurrence of any breach of the contract.<sup>9</sup>

The theory that the liability of the sureties or guarantors, as between themselves, rests on an implied contract, is not universally recognized, and, accordingly, in some jurisdictions, the death of one relieves his estate from the duty of contribution.<sup>10</sup>

## DISCHARGE OF SURETY OR GUARANTOR

11. The surety or guarantor may be able, in given cases, to set up any one of numerous defenses to an action against him by the creditor on the ground that his original contract was not binding *ab initio*, or that by some subsequent alteration in it, or in the principal contract, or some subsequent acts of the creditor injurious to his rights, or some change in circumstances, he is discharged. Thus:

(a) *Fraud*. If the creditor knows that the surety or guarantor was induced to become such by fraudulent representations, he cannot hold him to his contract.<sup>11</sup>

But he is not responsible for any deception practiced by the principal upon the guarantor, without the creditor's knowledge.<sup>12</sup>

(b) *Concealment*. If the creditor misleads the surety or guarantor at the time of the latter's executing his contract, or suppresses facts he should have disclosed, or refuses to answer proper inquiries, which would have revealed facts the surety or guarantor had a right to know, he cannot hold the latter liable.<sup>13</sup>

<sup>7</sup> *Johnson v. Harvey*, 84 N. Y. 365, 38 Am. Rep. 515; *Brandt, S. & G.* (3d Ed.) § 310.

<sup>8</sup> *Bradley v. Burwell*, *supra*. See *Rutz v. Oltman*, 168 Ill. App. 437.

<sup>9</sup> *Bradley v. Burwell*, 3 Denio (N. Y.) 66; *Toussaint v. Martinaut*, 2 Term R. 104; *Cowell v. Edwards*, 2 Bos. & P. 268; *Wood v. Leland*, 1 Metc. (Mass.) 387; *Bachelor v. Fiske*, 17 Mass. 464.

<sup>10</sup> *Waters' Representatives v. Riley's Adm'r*, 2 Har. & G. (Md.) 305, 18 Am. Dec. 302.

<sup>11</sup> *Beath v. Chapoton*, 115 Mich. 506, 73 N. W. 806, 69 Am. St. Rep. 589.

<sup>12</sup> *Powers v. Clarke*, 127 N. Y. 422, 28 N. E. 402; *Western New York Life Ins. Co. v. Clinton*, 66 N. Y. 326.

<sup>13</sup> *Benton County Sav. Bank v. Boddicker*, 105 Iowa, 548, 75 N. W. 632, 45 L. R. A. 321, 67 Am. St. Rep. 310; *Bellevue Building & Loan Ass'n v. Jeckel*, 104 Ky. 159, 46 S. W. 482; *Denton v. Butler*, 99 Ga. 264, 25 S. E. 624; *Fass-*

(c) *Invalidity of Principal Debt.* Usually, if the principal debtor is not bound by the principal contract, the surety is not bound by his contract of suretyship. But this principle does not apply where the nonliability of the principal is occasioned by a purely personal defense, in the nature of a privilege or protection, as infancy or coverture. In such cases, the surety is not released, but the contract subsists, as to him, in full force. The existence or possibility of the disability may have been the very reason why a surety was required.<sup>14</sup>

When the name of the principal or a surety has been forged, a co-surety, though he signed in the belief that the forged name was genuine, is nevertheless bound if the creditor accepted the instrument without notice of the forgery.<sup>15</sup>

The holder of a note may recover against one guaranteeing prompt payment at maturity, though the note is void as against the maker corporation because of want of authority of its treasurer to execute it, if purchased on the faith of such guaranty.<sup>16</sup>

But, where a note is usurious and void, the guaranty, if depending solely upon the same consideration, and not an independent contract, is also void.<sup>17</sup>

If usury in a note makes a waiver therein—as, for example, of a homestead right—absolutely void, the surety signing in ignorance of the usury is not bound.<sup>18</sup>

But statutes providing that a corporation shall not set up the defense of usury render such defense also unavailable to individual sureties and guarantors.<sup>19</sup>

If a bond is not merely a contract between the parties thereto, but is also part and parcel of a judicial proceeding, as in the case of a bond to procure an adjournment of a bastardy proceeding, it is void unless the officer who required the party to give it, as a condition of the ad-

nacht v. Emsing Gagen Co., 18 Ind. App. 80, 46 N. E. 45, 47 N. E. 480, 63 Am. St. Rep. 322; Traders' Ins. Co. v. Herber, 67 Minn. 106, 69 N. W. 701; Powers Dry-Goods Co. v. Harlin, 68 Minn. 193, 71 N. W. 16, 64 Am. St. Rep. 460; Jungk v. Holbrook, 15 Utah, 198, 49 Pac. 305, 62 Am. St. Rep. 921. See Brandt, S. & G. (3d Ed.) c. XVI.

<sup>14</sup> Kyger v. Sipe, 89 Va. 510, 16 S. E. 627. See p. 277, ante.

<sup>15</sup> Helms v. Wayne Agriculture Co., 73 Ind. 329, 38 Am. Rep. 147; Veazie v. Willis, 6 Gray, 90; Franklin Bank v. Stevens, 39 Me. 532. Contra: Southern Cotton Oil Co. v. Bass, 126 Ala. 343, 28 South. 576.

<sup>16</sup> Holm v. Jamieson, 173 Ill. 295, 50 N. E. 702, 45 L. R. A. 846.

<sup>17</sup> Heidenheimer v. Mayer, 42 N. Y. Super. Ct. 516; Rosa v. Butterfield, 33 N. Y. 665. See Brandt, S. & G. (3d Ed.) § 469.

<sup>18</sup> Prather v. Smith, 101 Ga. 283, 28 S. E. 857; Eagle Roller-Mill Co. v. Dillman, 67 Minn. 232, 69 N. W. 910; Allen v. Wilkerson, 99 Ga. 139, 25 S. E. 26.

<sup>19</sup> Rosa v. Butterfield, 33 N. Y. 665; Stewart v. Bramhall, 74 N. Y. 85. Compare: Merchants' Exchange Nat. Bank of City of New York v. Commercial Warehouse Co. of New York, 49 N. Y. 635.

journment, had jurisdiction of the person and of the case, and the sureties are not bound.<sup>20</sup>

(d) Any change in the principal contract, unless obviously unsubstantial or certainly nonprejudicial, discharges the surety, if made without his consent, even though it might prove beneficial to him.<sup>21</sup>

Thus, if, after a promissory note payable to a named payee or bearer is signed by one as surety, the principal so alters it as to increase the rate of interest, the note is thereby rendered void as to the surety, even in the hands of a bona fide holder for value without notice.<sup>22</sup>

But it is usually held that there may be changes so immaterial as not to effect a discharge.<sup>23</sup> And, if the agreement for a change is void, it does not effect a discharge.<sup>24</sup> And a change of part of a guaranteed account into the form of notes does not discharge the guarantor,<sup>25</sup> nor does a change in the nature or extent of the acts guaranteed, as compared with those performed in the same line of business, employment, or credit before the contract of suretyship or guaranty was executed, if the new class of acts is in fact covered by the terms of the latter contract.<sup>26</sup> And the same result follows where, after a bond has been executed by sureties or guarantors to secure the agreement of a national bank as a depository of state funds, the char-

<sup>20</sup> *People ex rel. Ritzenthaler v. Higgins*, 151 N. Y. 577, 45 N. E. 1033.

<sup>21</sup> *Prairie State Nat. Bank v. U. S.*, 164 U. S. 237, 17 Sup. Ct. 142, 41 L. Ed. 412; *Holme v. Brunskill*, 3 Q. B. Div. 495, 505; *Polak v. Everett*, 1 Q. B. Div. 669; *Ellesmere Brewery Co. v. Cooper* [1896] 1 Q. B. 75; *Reese v. U. S.*, 9 Wall. 21, 19 L. Ed. 541; *Finney v. Condon*, 86 Ill. 78; *Paine v. Jones*, 76 N. Y. 278, 279; *Page v. Krekey*, 137 N. Y. 313, 33 N. E. 311, 21 L. R. A. 409, 33 Am. St. Rep. 731; *Bennett v. Draper*, 139 N. Y. 266, 34 N. E. 791; *Village of Chester v. Leonard*, 68 Conn. 509, 37 Atl. 397; *Board of Com'rs of Morgan County v. Branham (C. C.)* 57 Fed. 179; *United States Glass Co. v. West Virginia Flint Bottle Co. (C. C.)* 81 Fed. 993. Compare *Mersman v. Werges*, 112 U. S. 139, 5 Sup. Ct. 65, 28 L. Ed. 641; *Equitable Surety Co. v. U. S. to Use of W. McMillan & Son*, 234 U. S. 448, 34 Sup. Ct. 803, 58 L. Ed. 1394; *American Bonding Co. of Baltimore v. Kelly*, 172 App. Div. 437, 158 N. Y. Supp. 812.

<sup>22</sup> *Hill v. O'Neill*, 101 Ga. 832, 28 S. E. 996; *Derr v. Keaough*, 96 Iowa, 397, 65 N. W. 339; *Farmers' & Merchants' Nat. Bank v. Novich*, 89 Tex. 381, 34 S. W. 914; *Windle v. Williams*, 18 Ind. App. 158, 47 N. E. 680. Compare *Keene's Adm'r v. Miller*, 103 Ky. 628, 45 S. W. 1041.

But now by the Negotiable Instruments Law the bona fide holder may recover according to the original tenor. *Norton, B. & N.* (4th Ed.) p. 322.

<sup>23</sup> *Etz v. Place*, 81 Hun. 206, 30 N. Y. Supp. 765; *Troy City Bank v. Lauman*, 19 N. Y. 477; *Wilkinson v. McKimmie*, 229 U. S. 590, 33 Sup. Ct. 879, 57 L. Ed. 1342.

<sup>24</sup> *Slaughter v. Moore*, 17 Tex. Civ. App. 233, 42 S. W. 372; *Watterson v. Owens River Canal Co.*, 25 Cal. App. 247, 143 Pac. 90; *Olmstead v. Latimer*, 158 N. Y. 313, 53 N. E. 5, 43 L. R. A. 685.

<sup>25</sup> *Lennox v. Murphy*, 171 Mass. 370, 50 N. E. 644.

<sup>26</sup> *People v. Backus*, 117 N. Y. 196, 22 N. E. 759.

ter expires, but is extended under a federal statute declaring that in case of such extension the bank shall continue to be in all respects the identical association it was before the extension.<sup>27</sup>

A bond for faithful service may be so worded as to survive various changes that would otherwise discharge.<sup>28</sup>

Illustrations of cases where a change in the relation, situation, status, etc., of the parties, or in the circumstances, does operate to release the surety or guarantor, or to throw given defaults outside the range of his liability, are stated under the head of "Extent of Liability."

(e) And where the party secured does some act which changes the position of the surety to his injury or prejudice, the latter is discharged absolutely or pro tanto, according to the circumstances.<sup>29</sup>

Mere delay by the creditor in suing the principal, or in proceeding against a fund pledged by him, does not release the surety or guarantor, even though loss may have thereby resulted.<sup>30</sup>

And mere postponement of one of the ordinary proceedings in a case in which an undertaking has been given does not release the sureties.<sup>31</sup>

This rule, of course, yields where the duty to proceed with diligence to collect of the principal is imposed by the contract, as in the case of a guaranty of collection;<sup>32</sup> though even in such cases, if indulgence by the creditors to the principal, in not enforcing the debt, is with the acquiescence of the guarantor, the latter thereby waives his strict right;<sup>33</sup> and, where laches of the creditor is such as to discharge the surety or guarantor, it thus operates only to the extent that the latter has suffered loss.<sup>34</sup>

<sup>27</sup> *People v. Backus*, 117 N. Y. 196, 22 N. E. 759; *Exeter Bank v. Rogers*, 7 N. H. 21. Compare *Thompson v. Young*, 2 Ohio, 334; *Union Bank of Maryland v. Ridgely*, 1 Har. & G. (Md.) 324; *Bank of Washington v. Barrington*, 2 Pen. & W. (Pa.) 27; *Brown v. Lattimore*, 17 Cal. 93.

<sup>28</sup> *Singer Mfg. Co. v. Reynolds*, 168 Mass. 588, 47 N. E. 438, 60 Am. St. Rep. 417.

<sup>29</sup> *Smith v. Molleson*, 148 N. Y. 247, 42 N. E. 669; *Gen. Steam Nav. Co. v. Rolt*, 6 C. B. (N. S.) 550; *Calvert v. Dock Co.*, 2 Keen, 638; *Warre v. Calvert*, 7 Adol. & El. 143; *Plunkett v. Davis Sewing Machine Co.*, 84 Md. 529, 36 Atl. 115.

<sup>30</sup> *Purdy v. Forstall*, 45 La. Ann. 814, 13 South. 95; *Schroeppe v. Shaw*, 3 N. Y. 446; *Evans v. Evans*, 16 Ala. 465; *Darby v. Berney Nat. Bank*, 97 Ala. 645, 11 South. 881; *Watson v. Barr*, 37 S. C. 463, 16 S. E. 188; *Patterson v. State Bank of Chrisman*, 55 Ind. App. 331, 102 N. E. 880; *Speer v. Rushing* (Tex. Civ. App.) 183 S. W. 67.

<sup>31</sup> *Steinbock v. Evans*, 122 N. Y. 556, 25 N. E. 929.

<sup>32</sup> *Northern Ins. Co. of New York v. Wright*, 76 N. Y. 445.

<sup>33</sup> *Mead v. Parker*, 111 N. Y. 264, 18 N. E. 727; *Woodcock v. Railway Co.*, 21 Law & Eq. Rep. 285; *Cummings v. Arnold*, 3 Metc. (Mass.) 486, 37 Am. Dec. 155; *Adams v. Way*, 32 Conn. 160.

<sup>34</sup> *Gilligan v. Boardman*, 29 Me. 79.

One who guarantees a sole trader for the faithful performance of duty by a clerk is no longer responsible if the trader takes a partner,<sup>35</sup> unless the contract otherwise provides.<sup>36</sup>

But the mere fact that a government, having a judgment against a principal debtor, releases him by a statute from imprisonment thereunder, does not discharge the surety.<sup>37</sup>

The duty of the creditor, in respect of securities held by him, towards the surety, is not active, but negative, and he is simply bound not to cancel, waste, or impair them. If securities are released by the creditor, they must possess more than a supposititious or imaginary value, in order to discharge the surety, and so with a bona fide exchange of securities.<sup>38</sup>

But, if security held by a creditor is lost through his negligence, or voluntarily released, without the surety's consent, the surety is pro tanto discharged.<sup>39</sup>

(f) A binding extension of the time of payment of the principal debt, without consent of the guarantor, discharges him, unless he subsequently assents to the extension and ratifies it.<sup>40</sup>

(g) The full payment or performance of the debt, act, or obligation of suretyship or guaranty operates to discharge the surety or guarantor. Thus, such liability ipso facto terminates when the debt secured is paid or payment is tendered.<sup>41</sup>

A contract of suretyship, entered into on behalf of a partnership as principal, continues no longer than the partnership itself.<sup>42</sup>

But a firm may by its conduct, after a change in its membership,

<sup>35</sup> *Wright v. Russell*, 3 Wils. 530; *Holmes v. Small*, 157 Mass. 223, 32 N. E. 3; *Lloyd v. Blackburn*, 9 Mees. & W. 363.

<sup>36</sup> *Garrett v. Handley*, 4 Barn. & C. 666.

<sup>37</sup> *Hunter v. U. S.*, 5 Pet. 173, 8 L. Ed. 86.

<sup>38</sup> *State Bank of Lock Haven v. Smith*, 155 N. Y. 200, 49 N. E. 680; *Neff's Appeal*, 9 Watts & S. (Pa.) 36; *Coates v. Coates*, 33 Beav. 249; *Young v. Cleveland*, 33 Mo. 126, 82 Am. Dec. 155; *Moss v. Pettingill*, 3 Minn. 217 (Gil. 145). See *Brandt, S. & G. (3d Ed.)* § 260.

<sup>39</sup> *Mingus v. Daugherty*, 87 Iowa, 56, 54 N. W. 66, 43 Am. St. Rep. 354; *Sherraden v. Parker*, 24 Iowa, 28; *Burr v. Boyer*, 2 Neb. 265. See *Brandt, S. & G. (3d Ed.)* § 480 et seq.

<sup>40</sup> *Bishop v. Eaton*, 161 Mass. 501, 39 N. E. 665, 42 Am. St. Rep. 437; *Chace v. Brooks*, 5 Cush. (Mass.) 43; *Calvo v. Davies*, 73 N. Y. 211, 29 Am. Rep. 130. See *Brandt, S. & G. (3d Ed.)* § 376 et seq.

<sup>41</sup> *Peteřish v. Watkins*, 124 Ill. 384, 16 N. E. 248; *Woodman v. Mooring*, 14 N. C. 237; *Felch v. Lee*, 15 Wis. 265; *Sharp v. Miller*, 57 Cal. 415; *Joslyn v. Eastman*, 46 Vt. 258; *Sears v. Van Dusen*, 25 Mich. 351; *Johnson v. Mills*, 10 Cush. (Mass.) 503. But contra as to tender. *Clark v. Sickler*, 64 N. Y. 231, 21 Am. Rep. 606.

For general rule that tender discharges surety, see *Spurgeon v. Smith*, 114 Ind. 453, 17 N. E. 105.

<sup>42</sup> *London & Life Ins. Co. v. Holt*, 10 S. D. 171, 72 N. W. 403.

ratify, and thus bind itself by, a letter of credit given by the old firm.<sup>43</sup>

(h) The surety or guarantor may, of course, be discharged by any act which, by the terms of their agreement, is accorded that effect, as by revocation in accordance with an express reserved right to revoke. So, also, by a binding mutual substitution of a new agreement in place of the old.<sup>44</sup>

(i) *Death of Surety or Guarantor.* The general presumption, in the absence of express words, that the parties to a contract intend to bind not only themselves, but their personal representatives, applies to contracts of suretyship or guaranty. The parties may, if they choose, contract otherwise. And the nature of the contract may be conclusive in determining the intent. In the case of a continuing guaranty of successive credits, the death of the guarantor, and notice thereof, terminates the guaranty as to subsequent credits, unless the contract provides otherwise.<sup>45</sup>

But, if the guaranty creates a continuing pecuniary obligation, the consideration for which is entire and given once for all, the death of the guarantor does not terminate the guaranty, unless so provided.<sup>46</sup>

And, as the death of the principal does not terminate the obligation to pay stipulated sums for a given period, so the liability of his surety or guarantor continues after the death of the principal.<sup>47</sup>

(j) *Revocation.* Contracts of suretyship or guaranty are irrevocable or revocable according as the consideration is entire, or is supplied from time to time, and therefore divisible.<sup>48</sup>

An instance of the first class is where a person enters into a guaranty that, in consideration of the lessor granting a lease to a third person, he will be answerable for the performance of the covenants. The moment the lease is granted there is nothing more for the lessor to

<sup>43</sup> *Smith v. Ledyard*, 49 Ala. 279.

<sup>44</sup> *Taylor v. Hilary*, 1 Cromp., M. & R. 741.

<sup>45</sup> *Coulthart v. Clementson*, 5 Q. B. Div. 42; *Harriss v. Fawcett*, L. R. 15 Eq. Cas. 311; *Lloyd's v. Harper*, 16 Ch. Div. 290.

It depends upon whether the guarantee is a contract or a bare authority. *Brandt, S. & G.* (3d Ed.) § 150.

<sup>46</sup> *Kernochan v. Murray*, 111 N. Y. 306, 18 N. E. 868, 2 L. R. A. 183, 7 Am. St. Rep. 744; *Holthausen v. Kells*, 18 App. Div. 80, 45 N. Y. Supp. 471, affirmed 154 N. Y. 776, 49 N. E. 1098; *Hecht v. Weaver* (C. C.) 34 Fed. 111; *Green v. Young*, 8 Greenl. (Me.) 14, 22 Am. Dec. 218; *Shackamaxon Bank v. Yard*, 143 Pa. 129, 22 Atl. 908, 24 Am. St. Rep. 521; *Id.*, 150 Pa. 351, 24 Atl. 635, 30 Am. St. Rep. 807.

<sup>47</sup> *Elmendorf v. Whitney*, 153 Pa. 460, 25 Atl. 607.

<sup>48</sup> The principle would seem to be as in the preceding case, whether the declaration of intention by the surety or guarantor is a contract or a bare authority or offer. A continuing guaranty is usually of the latter class.

do, and such a guaranty of necessity runs on throughout the duration of the lease. The lease was intended to be a guaranteed lease, and therefore the guarantor cannot put an end to the guaranty at his pleasure, nor is it to be put an end to by the death of the guarantor. So with a guaranty, in consideration of another party taking a person into his service, to be answerable for his fidelity as long as he continued therein. Instances of the second class are found in guaranties of a running account at a banker's, or a running account for goods supplied. There the consideration is supplied from time to time, and it is reasonable to hold, unless the guaranty stipulates to the contrary, that the guarantor may at any time terminate the guaranty as to subsequent transactions. In such cases, also, notice of the death of a guarantor is a sufficient notice to terminate the guaranty.<sup>49</sup>

But a surety bound for the fidelity and honesty of his principal, and so for an indefinite and contingent liability, and not for a sum fixed, and certain to become due, may revoke and end his future liability in either of two cases, viz.: Where the guaranteed contract has no definite time to run; and where it has such definite time, but the principal has so violated it and is so in default that the creditor may safely and lawfully terminate it on account of the breach.<sup>50</sup>

## SURETYSHIP IN RESPECT TO PARTNERSHIPS AND SALES OF REALTY

12. (a) Where a partner withdraws from a firm, or it is dissolved, and it is agreed that the other shall take the property and pay the firm debts, the latter becomes a principal, and the other a surety, and the usual principles of suretyship apply, both as between themselves and as to creditors with notice.<sup>51</sup>

<sup>49</sup> Lloyd's v. Harper, 16 Ch. Div. 319; Calvert v. Gordon, 3 Man. & R. 124; Coulthart v. Clementson, 5 Q. B. Div. 42; Snow v. Horgan, 18 R. I. 289, 27 Atl. 338; National Eagle Bank v. Hunt, 16 R. I. 151, 13 Atl. 115; Green v. Young, 8 Greenl. (8 Me.) 16, 22 Am. Dec. 218; Moore v. Wallis, 18 Ala. 463; Royal Ins. Co. v. Davies, 40 Iowa, 471, 20 Am. Rep. 581; Rapp's Estate v. Phoenix Insurance Co., 113 Ill. 394, 55 Am. Rep. 427; Offord v. Davies, 12 C. B. (N. S.) 756, 757; Jordan v. Dobbins, 122 Mass. 170, 171, 23 Am. Rep. 305; Menard v. Scudder, 7 La. Ann. 391, 392, 56 Am. Dec. 610.

<sup>50</sup> Emery v. Baltz, 94 N. Y. 414; Burgess v. Eve, L. R. 13 Eq. 450; Phillips v. Foxall, L. R. 7 Q. B. 666; Sanderson v. Aston, L. R. 8 Exch. 73; Singer Mfg. Co. v. Draughan, 121 N. C. 88, 28 S. E. 136, 61 Am. St. Rep. 657. See Vidi v. United Surety Co., 155 App. Div. 502, 140 N. Y. Supp. 612.

<sup>51</sup> Porter v. Baxter, 71 Minn. 195, 73 N. W. 844; Williams v. Boyd, 75 Ind. 286; Colgrove v. Tallman, 67 N. Y. 95, 23 Am. Rep. 90; Sizer v. Ray, 87 N. Y. 220; Chandler v. Higgins, 109 Ill. 602; Barber v. Gillson, 18 Nev. 89, 1 Pac. 452; Oakeley v. Pashleer, 10 Bligh, 548; Grigg v. Empire State Chemical Co., 17 Ga. App. 385, 87 S. E. 149; Johnson v. Jones, 59 Okl. 323, 135



Thus, if the retiring partner is obliged to pay a firm debt, he may recover the amount from the one who remains;<sup>52</sup> while, if the remaining partner pays the debt, he is not entitled to contribution from the one retiring.<sup>53</sup>

The same result follows where one partner transfers his interest in the firm property and assets to an outsider, who is thereupon admitted to the new firm, consisting of the other members of the old.<sup>54</sup>

But, to affect a creditor who extends time of payment or does other acts which would discharge a surety, he must have notice of the new arrangement and its binding effect.<sup>55</sup>

And in some jurisdictions it is held that he is not bound, even by notice, unless he has assented to the new relationship.<sup>56</sup>

(b) Where the owner of real property, incumbered by a mortgage which he is liable to pay, sells the equity to a purchaser, who assumes and agrees to pay the mortgage, the grantee becomes the principal in respect thereto, while the grantor becomes his surety.<sup>57</sup>

It follows that if, when the debt becomes due, the grantor pays it, he becomes entitled to be substituted to the mortgage security as it originally existed, with the right to proceed immediately against the land for his indemnity.<sup>58</sup>

And if, without the consent of the grantor, the mortgagee and the grantee effect a release or satisfaction of the mortgage, or a binding extension of the time for payment,<sup>59</sup> or a change in its terms,<sup>60</sup> the grantor is thereby discharged either absolutely or to the extent of his resulting injury, in accordance with principles already stated.

In order to establish the relation of principal and surety as to the grantor and the grantee, it is essential that the grantor be himself personally obligated to pay the debt, though it is not necessary that such obligation should have been created by the deed under which he acquired title.<sup>61</sup>

Pac. 12, 48 L. R. A. (N. S.) 547; *Clinchfield Fuel Co. v. W. M. Lundy & Son*, 130 Tenn. 135, 169 S. W. 563, L. R. A. 1915B, 418.

<sup>52</sup> *Shamburg v. Abbott*, 112 Pa. 12, 4 Atl. 518.

<sup>53</sup> *Hanna v. Hyatt*, 67 Mo. App. 308.

<sup>54</sup> *Morss v. Gleason*, 64 N. Y. 204.

<sup>55</sup> *Palmer v. Purdy*, 83 N. Y. 144.

<sup>56</sup> *Ridgley v. Robertson*, 67 Mo. App. 45; *Clinchfield Fuel Co. v. W. M. Lundy & Son*, 130 Tenn. 135, 169 S. W. 563, L. R. A. 1915B, 418.

<sup>57</sup> *Curry v. Hale*, 15 W. Va. 867; 2 *White & T. Lead. Cas. Eq.* pt. 1, p. 282; *Wager v. Link*, 134 N. Y. 122, 31 N. E. 213.

<sup>58</sup> *Calvo v. Davies*, 73 N. Y. 211, 29 Am. Rep. 130.

<sup>59</sup> *Calvo v. Davies*, 73 N. Y. 211, 29 Am. Rep. 130; *Union Mut. L. Ins. Co. v. Hanford*, 143 U. S. 191, 12 Sup. Ct. 437, 36 L. Ed. 118.

<sup>60</sup> *Paine v. Jones*, 76 N. Y. 274.

<sup>61</sup> *Wager v. Link*, 134 N. Y. 122, 31 N. E. 213; *Id.*, 150 N. Y. 555, 44 N. E. 1103.

It is also essential that the grantee should assume the payment of the mortgage. It is not enough that he take title subject to the mortgage.<sup>62</sup>

While it is the generally accepted doctrine that where land incumbered by a mortgage, which the owner is obligated to pay, is conveyed by him to a grantee, who assumes payment thereof, the mortgagee is entitled in some form to enforce the agreement against the grantee, there is a conflict upon the question whether his remedy should be at law or in equity.<sup>63</sup>

The question whether the remedy is at law or in equity is to be determined by the *lex fori*.<sup>64</sup>

In New York the right of the mortgagee has been supported upon the theory that, if one who is indebted transfers property to a third party upon the latter's promise to pay the debt, the creditor may sue the third party upon the contract thus made for the creditor's benefit, under the authority of the line of cases beginning with *Lawrence v. Fox*.<sup>65</sup>

Accordingly, in that state, the mortgagee is entitled to maintain his suit against the grantee, either in equity or at law.<sup>66</sup>

And the grantor's liability to the mortgagee is released by a binding extension of time given by the latter to the grantee, with knowledge of the mutual relations of the grantor and grantee, and without the grantor's consent, even though the mortgagee did not know of that relation at the time of the original contract, or even if that relation has been created since that time.<sup>67</sup>

As to the form of remedy, however, the United States Supreme Court has approved the doctrine that while the purchaser of lands subject to mortgage, who assumes and agrees to pay the mortgage debt,

<sup>62</sup> *Chilton v. Brooks*, 72 Md. 557, 20 Atl. 125; *Wager v. Link*, 150 N. Y. 554, 44 N. E. 1103; *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 650.

<sup>63</sup> *Burr v. Beers*, 24 N. Y. 178, 80 Am. Dec. 327; *Thorp v. Keokuk Coal Co.*, 48 N. Y. 253; *Dean v. Walker*, 107 Ill. 540, 545, 550, 47 Am. Rep. 467.

<sup>64</sup> *Union Mut. L. Ins. Co. v. Hanford*, 143 U. S. 190, 12 Sup. Ct. 437, 36 L. Ed. 118.

<sup>65</sup> 20 N. Y. 268; *Wager v. Link*, 134 N. Y. 127, 31 N. E. 213; *Hand v. Kennedy*, 83 N. Y. 154.

<sup>66</sup> *Halsey v. Reed*, 9 Paige (N. Y.) 446; *King v. Whitely*, 10 Paige (N. Y.) 465; *Blyer v. Monholland*, 2 Sandf. Ch. (N. Y.) 478; *Trotter v. Hughes*, 12 N. Y. 74, 62 Am. Dec. 137; *Burr v. Beers*, 24 N. Y. 178, 80 Am. Dec. 327; *Campbell v. Smith*, 71 N. Y. 26, 27 Am. Rep. 5; *Pardee v. Treat*, 82 N. Y. 385; *Hand v. Kennedy*, 83 N. Y. 150; *Bowen v. Beck*, 94 N. Y. 86, 46 Am. Rep. 124.

<sup>67</sup> *Union Mut. Life Ins. Co. v. Hanford*, 143 U. S. 191, 12 Sup. Ct. 437, 36 L. Ed. 118; *Ewin v. Lancaster*, 6 Best & S. 571; *Oriental F. Corp. v. Overend*, 7 Ch. App. 142, and L. R. 7 H. L. 348; *Smith v. Shelden*, 35 Mich. 42, 24 Am. Rep. 529.

becomes, as between himself and his vendor, the principal debtor, and the liability of the vendor, as between the parties, is that of surety, and if the vendor pays the mortgage debt he may sue the vendee at law for the moneys so paid, yet in equity, as at law, the contract of the purchaser to pay the mortgage, being made with the mortgagor and for his benefit only, creates no direct obligation of the purchaser to the mortgagee. And it has approved the doctrine that it is in application of the equitable principle that a creditor may have the benefit of all collateral obligations for the payment of the debt, which a person standing in the situation of a surety for others holds for his indemnity, that decrees for deficiency in foreclosure suits have been made against subsequent purchasers, who have assumed the payment of the mortgage debt. The mortgagee, upon this theory, is allowed, by a mere rule of procedure, to go directly, as a creditor, against the person ultimately liable, in order to avoid circuity of action, and save the mortgagor, as the intermediate party, from being harassed for the payment of the debt, and then driven to seek relief over against the person who has indemnified him, and upon whom the liability will ultimately fall. The mortgagee's only remedy against the grantee is in equity. In such a case, therefore, a mortgagee, who has in no way acted on the faith of, or otherwise made himself a party to, the agreement of the mortgagor's grantee to pay the mortgage, has no greater right than the mortgagor has against the grantee, and therefore cannot object to the striking out by a court of equity, or to the release by the mortgagor, of such an agreement, when inserted in the deed by mistake; and, on the other hand, such an agreement does not, without the mortgagee's assent, put the grantee and the mortgagor in the relation of principal and surety towards the mortgagee, so that the latter, by giving time to the grantee, will discharge the mortgagor.<sup>68</sup>

<sup>68</sup> *Keller v. Ashford*, 133 U. S. 610, 10 Sup. Ct. 494, 33 L. Ed. 667; *Elliott v. Sackett*, 108 U. S. 132, 2 Sup. Ct. 375, 27 L. Ed. 678; *Drury v. Hayden*, 111 U. S. 223, 4 Sup. Ct. 405, 28 L. Ed. 408; *Shepherd v. May*, 115 U. S. 505, 511, 6 Sup. Ct. 119, 29 L. Ed. 456; *Episcopal City Mission v. Brown*, 158 U. S. 227, 15 Sup. Ct. 833, 39 L. Ed. 960; *Crowell v. Currier*, 27 N. J. Eq. 152, s. c. sub nom. *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 650, 655, 656.

The New York rules are generally followed. See *Johns v. Willson*, 180 U. S. 447, 21 Sup. Ct. 445, 45 L. Ed. 613; *Reeves, Real Property*, p. 1103.



# INTEREST AND USURY

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## INTEREST

### 1. INTEREST DEFINED

Interest is the compensation fixed by agreement or allowed by law for the use or detention of money, or for the loss thereof to the party entitled to its use.<sup>1</sup>

### 2. WHEN INTEREST IS ALLOWED

When interest is allowed in any case, it must be by virtue of some contract, express or implied, or by virtue of some statute, or on ac-

<sup>1</sup> *Suth. Dam.* § 300; *Sedg. Meas. Dam.* § 282; *Loudon v. Taxing Dist. of Shelby County*, 104 U. S. 771, 26 L. Ed. 923; *Minard v. Beans*, 64 Pa. 411; *Daniels v. Wilson*, 21 Minn. 530; *Davis v. Yuba County*, 75 Cal. 452, 13 Pac. 874, 17 Pac. 533.

The allowance of interest as damages is still affected by the old idea that all interest is usurious and immoral and should therefore be allowed only as punishment for actual fault. See 22 Cyc. 1471. But the tendency is to conform this branch of the law of damages to the general theory of compensation.

The theory of interest as punishment for actual fault is illustrated by the following cases:

Where, for any reason, the defendant is not responsible for the delay in payment, he is not chargeable with interest. Thus, tender of a sufficient amount will stop the accruing of interest, even in actions of tort. *Thompson v. Boston & M. R. R. Co.*, 58 N. H. 524. Where the debtor is forbidden by law to pay the debt, he is not liable for interest during the delay. Thus, trustee process or injunction will interrupt the running of interest. *Le Grange v. Hamilton*, 4 Term R. 613; *Hamilton v. Le Grange*, 2 H. Bl. 144; *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. Ed. 204; *Norris v. Hall*, 18 Me. 332; *Bickford v. Rich*, 105 Mass. 340; *Le Branthwait v. Halsey*, 9 N. J. Law, 3; *Kellogg v. Hickok*, 1 Wend. (N. Y.) 521; *Stevens v. Barringer*, 13 Wend. (N. Y.) 639. In some states a garnishee of person enjoined must bring the money into court, or he will be chargeable with interest. *Kirkman v. Vanlier*, 7 Ala. 217; *Smith v. German Bank*, 60 Miss. 69. Interest as damages does not accrue in time of war, where the debtor is in one hostile country and the creditor in the other. Interest accruing by contract is not affected. *Hoare v. Allen*, 2 Dall. 102, 1 L. Ed. 307; *Foxcraft v. Nagle*, 2 Dall. 132, 1 L. Ed. 319; *Bigler v. Waller, Chase*, 316, Fed. Cas. No. 1,404; *Mayer v. Reed*, 37 Ga. 482; *Selden v. Preston*, 11 Bush (Ky.) 191; *Bordley v. Eden*, 3 Har. & McH. (Md.) 167; *Brewer v. Hastie*, 7 Va. 22; *Lash v. Lambert*, 15 Minn. 416 (Gil. 336), 2 Am. Rep. 142; *Brown v. Hiatt*, 15 Wall. 177, 21 L. Ed. 128; *Ward v. Smith*, 7 Wall. 447, 19 L. Ed. 207. Generally, as to what will relieve a debtor from interest, see *Miller v. Bank of New Orleans*, 5 Whart. (Pa.) 503, 34 Am. Dec. 571; *Redfield v. Ystalyfera Iron Co.*, 110 U. S. 174, 3 Sup. Ct. 570, 28 L. Ed. 109; *Bar-*

count of the default of the party liable to pay; and then it is allowed as damages for the default.<sup>2</sup>

By the common law, interest could in no case be recovered. The first English statute allowing interest was that of 37 Hen. VIII, c. 9.<sup>3</sup>

Even after that time, the common-law rule, as expounded in England, allowed interest only upon mercantile securities, or in those cases where there had been an express promise to pay interest, or where such promise was to be implied from the usage of trade.<sup>4</sup>

In the absence of these conditions, interest was not allowed in an action for money lent, or for money had and received, or for money paid, or on an account stated, or for goods sold, even though to be paid for on a particular day, or for work and labor.<sup>5</sup>

Thus the law remained in England until St. 3 & 4 Wm. IV, c. 42, §§ 28, 29, providing that upon all debts or sums certain, and in actions of trover and trespass de bonis asportatis, and in actions upon policies of insurance, the jury may, in their discretion, allow interest as part of the recovery. Independently of this statute, interest was allowed as special damages for the detention of money, but it must be specially pleaded.<sup>6</sup>

In America some states hold that the right to interest is given by the common law.<sup>7</sup>

In other states, however, it is held that the common law gives no right to interest, but merely allows the parties to contract for it, and that, unless the right is given by contract or statute, it cannot be recovered.<sup>8</sup>

tells v. Redfield (C. C.) 27 Fed. 286; Stewart v. Schell (C. C.) 31 Fed. 65; Laura Jane v. Hagen, 10 Humph. (Tenn.) 332.

And see p. 319, post.

<sup>2</sup> In re New York & B. Bridge, 137 N. Y. 98, 32 N. E. 1054; Barnard v. Bartholomew, 22 Pick. (Mass.) 291.

<sup>3</sup> National Bank of Commonwealth v. Mechanics' Nat. Bank, 94 U. S. 437, 24 L. Ed. 176.

<sup>4</sup> Mayne, Dam. 105; Higgins v. Sargent, 2 Barn. & C. 349.

<sup>5</sup> White v. Miller, 78 N. Y. 394, 34 Am. Rep. 544; Gordon v. Swan, 12 East, 419; Calton v. Bragg, 15 East, 223; Walker v. Constable, 1 Bos. & P. 306; Carr v. Edwards, 3 Starkie, 132; Nichol v. Thompson, 1 Camp. 52, note; Trelawney v. Thomas, 1 H. Bl. 303.

<sup>6</sup> Watkins v. Morgan, 6 Car. & P. 661; Price v. Railway Co., 16 Mees. & W. 244; Cameron v. Smith, 2 Barn. & Ald. 305; Cook v. Fowler, L. R. 7 H. L. 27.

<sup>7</sup> Young v. Godbe, 15 Wall. 562, 21 L. Ed. 250; Young v. Polack, 3 Cal. 208; Wood v. Robbins, 11 Mass. 504, 6 Am. Dec. 182; Boyd v. Gilchrist, 15 Ala. 849.

<sup>8</sup> Parmelee v. Lawrence, 48 Ill. 331; Denver, S. P. & P. R. Co. v. Conway, 8 Colo. 1, 5 Pac. 142, 54 Am. Rep. 537; Kenney v. Hannibal & St. J. R. Co., 63 Mo. 99.

In all the states the matter of interest is largely regulated by statute. In New York the allowance of interest was at first mainly confined to cases coming within the common-law rule, and to actions to recover money wrongfully detained by the defendant. The rule was then extended so as to allow interest upon the value of property unjustly detained or wrongfully taken or converted, and for goods sold and delivered, and for work and labor; and thus, by a sort of judicial legislation, the allowance of interest, as a legal right, was carried much further here than the scope of the English statute where the allowance was placed simply in the discretion of the jury. There is no New York statute regulating the allowance of interest in any of these cases.<sup>9</sup> In some states such statutes exist.<sup>10</sup>

### *By Contract*

Interest on a principal sum may be stipulated for in the contract itself, either to run from the date of the contract until it matures or until payment is made.<sup>11</sup> The agreement for interest may be either express or implied, and an agreement to that effect will be implied where there was a custom to charge interest, which was known to the defendant.<sup>12</sup> But "interest does not run upon a contract, unless especially provided for therein, until the time fixed for payment."<sup>13</sup>

In an action for breach of contract, whether interest is recoverable does not rest in the discretion of the jury, but it is a question of law for the court.<sup>14</sup> Whether, in a given case, interest is recoverable as matter of law, depends in part upon statutes and in part upon principles to be hereafter stated.<sup>15</sup>

<sup>9</sup> *White v. Miller*, 78 N. Y. 395, 34 Am. Rep. 544.

<sup>10</sup> *New York, L. E. & W. R. Co. v. Estill*, 147 U. S. 619, 13 Sup. Ct. 444, 37 L. Ed. 292; *Morley v. Lake Shore & M. S. R. Co.*, 146 U. S. 168, 13 Sup. Ct. 54, 36 L. Ed. 925.

<sup>11</sup> *Morley v. Lake Shore & M. S. R. Co.*, 146 U. S. 168, 13 Sup. Ct. 54, 36 L. Ed. 925.

<sup>12</sup> *Ayers v. Metcalf*, 39 Ill. 307; *Veiths v. Hagge*, 8 Iowa, 163; *McAllister v. Reab*, 4 Wend. (N. Y.) 483; *Reab v. McAlister*, 8 Wend. (N. Y.) 109; *Meech v. Smith*, 7 Wend. (N. Y.) 315; *Dickson v. Surginer*, 3 Brev. (S. C.) 417; *Fisher v. Sargent*, 10 Cush. (Mass.) 250; *Knox v. Jones*, 2 Dall. 193, 1 L. Ed. 345; *Bispham v. Pollock*, 1 McLean, 411, Fed. Cas. No. 1,442; *Koons v. Miller*, 3 Watts & S. (Pa.) 271; *Watt v. Hoch*, 25 Pa. 411; *Adams v. Palmer*, 30 Pa. 346.

<sup>13</sup> *In re Clever's Estate*, 154 Pa. 482, 25 Atl. 814.

<sup>14</sup> *Mansfield v. New York Cent. & H. R. R. Co.*, 114 N. Y. 336, 21 N. E. 735, 1037, 4 L. R. A. 566.

<sup>15</sup> *Lewis v. Rountree*, 79 N. C. 122, 128, 28 Am. Rep. 309; *Dana v. Fiedler*, 12 N. Y. 40-50, 62 Am. Dec. 130; *Broughton v. Mitchell*, 64 Ala. 210; *Hamer v. Hathaway*, 33 Cal. 117; *Andrews v. Durant*, 18 N. Y. 496; *De Lavallette v.*



*Interest on Promissory Notes*

"The words 'with interest' in a contract—as, for example, in a promissory note—imply a promise to pay interest from date. Without them, the note would carry interest from maturity, as matter of law."<sup>16</sup> A promissory note payable on demand, and making no provision for interest, carries interest, not from its date, but from demand.<sup>17</sup> If no time of payment is specified, interest begins to accrue at once, though not provided for.<sup>18</sup>

*Interest on Insurance Policies*

Interest is recoverable on the amount due on an insurance policy.<sup>19</sup>

*Interest on Coupons*

Coupons attached to bonds, and representing the interest payable upon the principal, may or may not themselves carry interest, according to circumstances. While they are in the hands of the holder of the bond, though detached and overdue, they remain mere incidents of the bond, and have no greater force and effect than the stipulation for the payment of interest contained in the bond. But they may become separate and independent instruments. This does not occur until they are utilized as such.<sup>20</sup>

In some states, however, coupons, though still attached to the bonds, carry interest from the time when payable.<sup>21</sup> And if the law of a state, as it exists when bonds with coupons are issued, allows interest on coupons from the time when they fall due, the Legislature has no power, even in the form of a retroactive declaration as to what the

Wendt, 75 N. Y. 579, 31 Am. Rep. 494; Robinson v. Corn Exchange Ins. Co., 1 Abb. Prac. N. S. (N. Y.) 186; Wehle v. Butler, 43 How. Prac. (N. Y.) 5; Rhemke v. Clinton, 2 Utah, 230.

<sup>16</sup> Smith v. Goodlett, 92 Tenn. 230, 21 S. W. 106; Gibbs v. Fremont, 9 Exch. 25; Kitchen v. Branch Bank at Mobile, 14 Ala. 233; Swett v. Hooper, 62 Me. 54.

<sup>17</sup> Bishop v. Sniffen, 1 Daly (N. Y.) 155; 2 Pars. Notes & B. 393; Herrick v. Woolverton, 41 N. Y. 581, 596, 1 Am. Rep. 461; Hunter v. Wood, 54 Ala. 71; Dodge v. Perkins, 9 Pick. (Mass.) 369; Stanley v. Franco-American Ferment Co., 97 Misc. Rep. 401, 161 N. Y. Supp. 365.

<sup>18</sup> Purdy v. Phillips, 11 N. Y. 406; Sheldon v. Heaton, 88 Hun, 535, 34 N. Y. Supp. 856; Chester v. Jumel, 125 N. Y. 237, 26 N. E. 297; Dame v. Wood, 75 N. H. 38, 70 Atl. 1081.

<sup>19</sup> Swamscot Mach. Co. v. Partridge, 25 N. H. 369, 380.

<sup>20</sup> Williamsburgh Sav. Bank v. Town of Solon, 136 N. Y. 465, 481, 32 N. E. 1058; Bowman v. Neely, 137 Ill. 443, 447, 27 N. E. 758; Id., 151 Ill. 37, 37 N. E. 840; Everton v. National Bank of Newport, 66 N. Y. 14, 23 Am. Rep. 9.

<sup>21</sup> Mills v. Town of Jefferson, 20 Wis. 50; Gelpcke v. City of Dubuque, 1 Wall. 175, 206, 17 L. Ed. 520; Aurora v. West, 7 Wall. 82, 104, 19 L. Ed. 42.

Interest allowed from maturity of bond, whether coupons separated or not. McDowell v. North Side Bridge Co., 251 Pa. 585, 97 Atl. 97.

former law was, to change this principle as to such coupons, and cut off the right to interest thereon.<sup>22</sup>

### *By Statute*

Interest is frequently provided for by statute; as, for example, from the maturity of certain debts until judgment,<sup>23</sup> or upon judgments,<sup>24</sup> in both which cases the interest is in the nature of damages. And sometimes the right to interest as compensation, and not as damages, also rests upon statute; as, for example, in statutes relating to condemnation proceedings, and providing that title shall vest in the city upon confirmation of the commissioners' report, and that the comptroller shall pay the compensation awarded, "with lawful interest from the date of confirmation."<sup>25</sup>

In some states there are statutes providing that interest shall be allowed "on money withheld by an unreasonable and vexatious delay of payment." In such a case interest is not to be computed merely from the time when the delay began to be unreasonable and vexatious, but is to be computed from the time when the debt became due.<sup>26</sup>

### *As Damages*

Interest is given on money demands as damages for delay in payment, being just compensation to the plaintiff for a default on the part of the debtor.

(a) Where it is expressly reserved in the contract, or is implied by the nature of the promise, it becomes part of the debt, and is recoverable as of right; but when it is given as damages it is often matter of discretion.<sup>27</sup>

(b) If the contract does not provide for interest after maturity and failure to pay, the question whether interest shall accrue depends

<sup>22</sup> *Koshkonong v. Burton*, 104 U. S. 668, 676, 26 L. Ed. 886.

<sup>23</sup> *Morley v. Lake Shore & M. S. R. Co.*, 146 U. S. 168, 13 Sup. Ct. 54, 36 L. Ed. 925.

<sup>24</sup> Code Civ. Proc. N. Y. § 1211; *O'Brien v. Young*, 95 N. Y. 428, 47 Am. Rep. 64. Also upon verdicts. Code Civ. Proc. N. Y. § 1235.

<sup>25</sup> *Devlin v. City of New York*, 131 N. Y. 123, 30 N. E. 45.

<sup>26</sup> *City of Chicago v. Tebbetts*, 104 U. S. 120, 125, 26 L. Ed. 655.

<sup>27</sup> *Redfield v. Ystalyfera Iron Co.*, 110 U. S. 176, 3 Sup. Ct. 570, 28 L. Ed. 109; *Jourolmon v. Ewing*, 26 C. C. A. 23, 80 Fed. 604. See *Mansfield v. New York Cent. & H. R. R. Co.*, 114 N. Y. 336, 21 N. E. 735, 1037, 4 L. R. A. 566.

Interest may therefore be demanded in a declaration or complaint in an action to recover the principal, and is computed to the time of verdict or judgment. "The interest is an accessory to the principal, and the plaintiff cannot bring a new action for any interest grown due between the commencement of his action and the judgment in it. \* \* \* I don't know of any court in any country (and I have looked into the matter) which don't carry interest down to the last act by which the sum is liquidated." Lord Mansfield, in *Robinson v. Bland*, 2 Burrows, 1087.

wholly on the law of the state. If the state declares that, in case of breach, interest shall accrue, such interest is in the nature of damages, and, as between the parties to the contract, such interest will continue to run until payment, or until the owner of the cause of action elects to merge it into judgment.<sup>28</sup>

(c) At common law, neither verdicts nor judgments bore interest,<sup>29</sup> but now, after the cause of action, whether a tort or a broken contract, not itself prescribing interest till payment, shall have been merged into a judgment, whether interest shall accrue upon the judgment is a matter not of contract between the parties, but of legislative discretion, which is free, so far as the federal Constitution is concerned, to provide for interest as a penalty, or liquidated damages for the nonpayment of the judgment, or not to do so. When such provision is made by statute, the owner of the judgment is entitled to the interest so prescribed until payment is received, or until the state shall, in the exercise of its discretion, change the rate or declare that such interest shall, from then on, cease to accrue. For such purposes the judgment is not a contract, and consequently such a statutory declaration is not within the prohibition of the federal Constitution against impairing contracts, or depriving one of property without due process of law.<sup>30</sup>

So, in some states, it is provided by statute that interest may be recovered upon the amount awarded by a verdict, to be computed from

<sup>28</sup> *Morley v. Lake Shore & M. S. R. Co.*, 146 U. S. 168, 13 Sup. Ct. 54, 36 L. Ed. 925.

<sup>29</sup> *Massachusetts Ben. Ass'n v. Miles*, 137 U. S. 691, 11 Sup. Ct. 234, 34 L. Ed. 834.

But in an action on a judgment interest is usually allowed, 22 Cyc. 1517; *Walton v. Vanderhoof*, 2 N. J. Law, 73; *Todd v. Botchford*, 86 N. Y. 517. And see *De la Rama v. De la Rama*, 241 U. S. 154, 36 Sup. Ct. 518, 60 L. Ed. 932, Ann. Cas. 1917C, 411.

<sup>30</sup> *Morley v. Lake Shore & M. S. R. Co.*, 146 U. S. 162, 13 Sup. Ct. 54, 36 L. Ed. 925; *O'Brien v. Young*, 96 N. Y. 428, 47 Am. Rep. 64.

It is usually held that interest is recoverable in an action of debt on a judgment, regardless of whether the original demand carried interest or not. *Klock v. Robinson*, 22 Wend. (N. Y.) 157. It is held in some states to be recoverable by common law. *Perkins v. Fourniquet*, 14 How. 328, 331, 14 L. Ed. 441; *Crawford v. Simonton's Ex'rs*, 7 Port. (Ala.) 110; *Gwinn v. Whitaker's Adm'r*, 1 Har. & J. (Md.) 754; *Hodgdon v. Hodgdon*, 2 N. H. 169; *Mahurin v. Bickford*, 6 N. H. 567; *Harrington v. Glenn*, 1 Hill (S. C.) 79; *Nelson v. Felder*, 7 Rich. Eq. (S. C.) 395; *Beall v. Silver*, 2 Rand. (Va.) 401; *Mercer's Adm'r v. Beale*, 4 Leigh (Va.) 189; *Booth v. Ableman*, 20 Wis. 602. It is recoverable by statute. *Dougherty v. Miller*, 38 Cal. 548; *Brigham v. Vanbuskirk*, 6 B. Mon. (Ky.) 197; *Todd v. Botchford*, 86 N. Y. 517; *Coles v. Kelsey*, 13 Tex. 75; *Hagood v. Aikin*, 57 Tex. 511. It was held not recoverable, without statute, in *Reece v. Knott*, 3 Utah, 451, 24 Pac. 757. See, also, *Guthrie v. Wickliffs*, 4 Bibb (Ky.) 541, 7 Am. Dec. 746; *Cogwell's Heirs v. Lyon*, 3 J. J. Marsh. (Ky.) 38. See *Sutherland*, Dam. (4th Ed.) § 333.

the date thereof, the judgment to be entered for the amount of the verdict with such interest.<sup>31</sup>

So, under the National Banking Act, the claim of a depositor, in a bank which has suspended, is, after being proved to the satisfaction of the Comptroller, of the same efficacy as a judgment, and bears interest as a judgment would do.<sup>32</sup>

### *Rate between Default and Judgment*

By the law of many states, contracts drawing a specified rate of interest before maturity draw the same rate of interest afterwards.<sup>33</sup> While in others the contract rate in such a case continues only until maturity, and from then on the statutory rate prevails.<sup>34</sup> And even in states where the statutory rate prevails after maturity, in the absence of any contrary provision in the contract, a provision for a specified rate of interest "until payment" continues the contract rate in force after maturity;<sup>35</sup> and so where the stipulation is for interest "annually."<sup>36</sup> But this latter rule does not apply where the agreement is to pay a principal sum in installments, at specified dates, with

<sup>31</sup> Code Civ. Proc. N. Y. § 1235; Massachusetts Ben. Ass'n v. Miles, 137 U. S. 691, 11 Sup. Ct. 234, 34 L. Ed. 834; Munsell v. Flood, 46 N. Y. Super. Ct. 134.

<sup>32</sup> National Bank of Commonwealth v. Mechanics' Nat. Bank, 94 U. S. 439, 24 L. Ed. 176; People v. Merchants' Trust Co., 187 N. Y. 293, 79 N. E. 1004.

<sup>33</sup> Hand v. Armstrong, 18 Iowa, 324; Brannon v. Hursell, 112 Mass. 63; Marietta Iron Works v. Lottimer, 25 Ohio St. 621; Phinney v. Baldwin, 16 Ill. 108, 61 Am. Dec. 62; Kohler v. Smith, 2 Cal. 597, 56 Am. Dec. 369; Ohio v. Frank, 103 U. S. 697, 26 L. Ed. 531; Boswell v. Big Vein Pocahontas Coal Co. (D. C.) 217 Fed. 822 (rule in Va.); Board of Com'rs of Oklahoma County v. Seymour, 45 Okl. 533, 146 Pac. 219; Wyckoff v. Wyckoff, 44 N. J. Eq. 56, 13 Atl. 662.

<sup>34</sup> O'Brien v. Young, 95 N. Y. 430, 47 Am. Rep. 64; Holden v. Freedman's Sav. & Trust Co., 100 U. S. 72, 25 L. Ed. 567; Brewster v. Wakefield, 22 How. 118, 16 L. Ed. 301; Bernhisel v. Firman, 22 Wall. 170, 22 L. Ed. 766; Cook v. Fowler, L. R. 7 H. L. 27; Kohler v. Smith, 2 Cal. 597, 56 Am. Dec. 369; First Ecclesiastical Society of Suffield v. Loomis, 42 Conn. 570; Jefferson County v. Lewis, 20 Fla. 980; Brown v. Hardcastle, 63 Md. 484; Ashuelot R. Co. v. Elliot, 57 N. H. 397; Pearce v. Hennessy, 10 R. I. 223; Kitchen v. Branch Bank at Mobile, 14 Ala. 233. See Cromwell v. Sac County, 96 U. S. 51, 24 L. Ed. 681; Siphon Ventilator Co. v. Hutton, 116 Ark. 545, 175 S. W. 30; Sands v. Gilleran, 159 App. Div. 37, 144 N. Y. Supp. 337. Cf. Kaufmann v. Kaufmann, 239 Pa. 42, 86 Atl. 634.

<sup>35</sup> O'Brien v. Young, 95 N. Y. 430, 47 Am. Rep. 64; Barlow v. Lande, 26 Cal. App. 424, 147 Pac. 231; Morris v. Baird, 72 W. Va. 1, 78 S. E. 371, Ann. Cas. 1915A, 1273; Zimmermann v. Klauber, 139 App. Div. 26, 123 N. Y. Supp. 642. Contra: Wright v. Hanna, 210 Pa. 349, 59 Atl. 1097.

That the specified rate does not control the court under any circumstances, but is only evidence of probable damage, see Cook v. Fowler, L. R. 7 H. L. 27; Powell v. Peck, 15 Ont. A. 138.

<sup>36</sup> Westfield v. Westfield, 19 S. C. 85.

interest at a specified rate "on all sums remaining unpaid." Such a provision refers only to the sums not due at any given time. After they become due, and then remain unpaid, the statutory rate prevails.<sup>37</sup>

Where a note is payable on demand,<sup>38</sup> or one day after date,<sup>39</sup> the intent to make a continuing obligation is obvious, and therefore interest will be allowed at the stipulated rate.

Interest as damages is given at the statutory rate.<sup>40</sup> Where no rate is fixed by statute, it is given at the customary rate.<sup>41</sup> Where the statutory rate is changed after interest begins to accrue, interest, as damages, accrues thereafter at the new rate.<sup>42</sup> But otherwise where it is not allowed as damages.<sup>43</sup>

In an action to recover possession of bonds, the fact that they only bore 4 per cent. interest is immaterial on the rate to which plaintiffs are entitled to recover, from the date of demand, in addition to the amount found to represent the value of the bonds. Upon demand, the plaintiff is entitled to either the bonds or to their value, and from that time on, if the bonds cannot be restored, to their value, with interest thereon at the legal rate.<sup>44</sup>

In an action on a contract,<sup>45</sup> interest should be given at the rate of the place of performance, or of the place where the contract was made.<sup>46</sup> The parties may legally agree upon interest at the rate either

<sup>37</sup> *Ferris v. Hard*, 135 N. Y. 365, 32 N. E. 129. Compare *Miller v. Hall*, 18 S. C. 141.

<sup>38</sup> *Paine v. Caswell*, 68 Me. 80, 28 Am. Rep. 21; *Siphon Ventilator Co. v. Hutton*, 116 Ark. 545, 175 S. W. 30.

<sup>39</sup> *Casteel v. Walker*, 40 Ark. 117, 48 Am. Rep. 5; *Gray v. Briscoe*, 6 Bush (Ky.) 687; *Sharpe v. Lee*, 14 S. C. 341.

<sup>40</sup> *Wegner v. Second Ward Sav. Bank*, 76 Wis. 242, 44 N. W. 1096; *Jersey City v. Flynn*, 74 N. J. Eq. 104, 70 Atl. 497; *Govin v. De Miranda*, 140 N. Y. 474, 35 N. E. 626; *Wentworth v. Manhattan Market Co.*, 218 Mass. 91, 106 N. E. 118; *Siltz v. Springer*, 236 Ill. 276, 85 N. E. 748.

<sup>41</sup> *Davis v. Greely*, 1 Cal. 422; *Perry v. Taylor*, 1 Utah, 63.

<sup>42</sup> *Wilson v. Cobb*, 31 N. J. Eq. 91; *White v. Lyons*, 42 Cal. 279; *Woodward v. Woodward*, 28 N. J. Eq. 119; *In re Doremus' Estate*, 33 N. J. Eq. 234; *Mayor, etc., of Jersey City v. O'Callaghan*, 41 N. J. Law, 349; *Reese v. Rutherford*, 90 N. Y. 644; *Sanders v. Lake Shore & M. S. Ry. Co.*, 94 N. Y. 641; *O'Brien v. Young*, 95 N. Y. 428, 47 Am. Rep. 64; *Stark v. Olney*, 3 Or. 88.

<sup>43</sup> *Wyckoff v. Wyckoff*, 44 N. J. Eq. 56, 13 Atl. 662. Compare *Searle v. Adams*, 3 Kan. 515, 89 Am. Dec. 598.

<sup>44</sup> *Govin v. De Miranda*, 140 N. Y. 479, 35 N. E. 626.

<sup>45</sup> *Pana v. Bowler*, 107 U. S. 529, 2 Sup. Ct. 704, 27 L. Ed. 424; *Sutro Tunnel Co. v. Segregated Belcher Min. Co.*, 19 Nev. 121, 7 Pac. 271.

<sup>46</sup> *Gibbs v. Fremont*, 9 Exch. 25; *Courtois v. Carpentier*, 1 Wash. C. C. 376, Fed. Cas. No. 3,286; *French v. French*, 126 Mass. 360; *Pauska v. Daus*, 31 Tex. 67; *Porter v. Munger*, 22 Vt. 191. See *Conflict of Laws*, p. 428, post.

of the state where the contract is executed or where payment is to be made.<sup>47</sup> Where no rate is stipulated, the law of the state where the contract was to be performed is usually controlling.<sup>48</sup>

But it has been held that interest on overdue coupons should be given at the rate of the place where the action was brought.<sup>49</sup> The question of the rate of interest is a local one, and the federal courts follow the local law in a given case,<sup>50</sup> even as applied to interest on judgments in actions removed from a state court.<sup>51</sup>

#### *Rate after Judgment*

The parties may, by their contract, stipulate that a specified rate of interest shall be paid after judgment. Such is sometimes held to be the effect of a provision in the contract that interest shall be at a specified rate "until payment."<sup>52</sup> While sometimes that clause is understood to refer to payment of the principal sum as such, as distinguished from the payment of a judgment therefor; and under that construction the contract provision ceases to be operative when the creditor, after maturity of the debt, elects to merge it in a judgment.<sup>53</sup>

Apart from the effect of a special contract provision, the rate of interest upon a judgment depends upon the terms of the statute of the state, so far as concerns the enforcement thereof in that state; but, if an action is brought in another state upon the judgment, the rate of interest recoverable is that allowed by the latter,<sup>54</sup> and, if the original action is brought in a federal court, interest is allowed on the judgment in all cases where, by the law of the state in which such court is held, interest may be levied under process of execution on judgments recovered in the courts of such state, to be calculated at the rate so allowed from the date of the judgment; and interest may also be computed

<sup>47</sup> *Peck v. Mayo*, 14 Vt. 33, 39 Am. Dec. 205; *Kilgore v. Dempsey*, 25 Ohio St. 413, 18 Am. Rep. 306; *Staples v. Nott*, 128 N. Y. 403, 28 N. E. 515, 26 Am. St. Rep. 480.

<sup>48</sup> *Hunt's Ex'r v. Hall*, 37 Ala. 702; *Von Hemert v. Porter*, 11 Metc. (Mass.) 210; *Cartwright v. Greene*, 47 Barb. (N. Y.) 9. See *Conflict of Laws*, p. 425, post.

<sup>49</sup> *Fauntleroy v. Hannibal*, 5 Dill. 219, Fed. Cas. No. 4,692.

<sup>50</sup> *Massachusetts Ben. Ass'n v. Miles*, 137 U. S. 691, 11 Sup. Ct. 234, 34 L. Ed. 834.

<sup>51</sup> *Id.*

<sup>52</sup> *Morley v. Lake Shore & M. S. Ry. Co.*, 146 U. S. 168, 13 Sup. Ct. 54, 36 L. Ed. 925.

<sup>53</sup> *O'Brien v. Young*, 95 N. Y. 430, 47 Am. Rep. 64.

<sup>54</sup> *Morley v. Lake Shore & M. S. Ry. Co.*, 146 U. S. 171, 13 Sup. Ct. 54, 36 L. Ed. 925; *Parker v. Thompson*, 3 Pick. (Mass.) 429; *Hopkins v. Shepard*, 129 Mass. 600; *Nelson v. Felder*, 7 Rich. Eq. (S. C.) 395. See *Crone v. Dawson*, 19 Mo. App. 214; *Porter v. Munger*, 22 Vt. 191. Contra: *Britton v. Chamberlain*, 234 Ill. 246, 84 N. E. 895. So in other states. 22 Cyc. 1480.

from the date of the verdict, and included in the judgment, if allowed by the statutes of that state.<sup>55</sup>

### *Liquidated and Unliquidated Damages*

"The general rule is that, whenever the debtor knows what he is to pay and when he is to pay it, he shall be charged with interest if he neglects to pay."<sup>56</sup>

*In actions for breach of a contract*, where the damages are unliquidated, interest is not to be allowed upon the damages, unless they are such as might be easily ascertained and computed, at the time of the breach, from facts which are then known to exist.<sup>57</sup>

### *Liquidated Damages*

Where the amount involved is liquidated, interest begins to run as soon as it is payable, either from a time stipulated for payment, or from demand, or from the time of suit brought, according to the terms of the contract and the circumstances of the given case.<sup>58</sup>

### *Damages Capable of Liquidation*

The same principle is applicable where the damages, though not ac-

<sup>55</sup> Massachusetts Ben. Ass'n v. Miles, 137 U. S. 691, 11 Sup. Ct. 234, 34 L. Ed. 834.

<sup>56</sup> People v. New York County, 5 Cow. (N. Y.) 331; Curtis v. Innerarity, 6 How. 146, 12 L. Ed. 380; Whitworth v. Hart, 22 Ala. 343; Peoria Marine & Fire Ins. Co. v. Lewis, 18 Ill. 553; Clark v. Dutton, 69 Ill. 521; Stern v. People, 102 Ill. 540; Hall v. Huckins, 41 Me. 574; Newson's Adm'r v. Douglass, 7 Har. & J. (Md.) 417, 16 Am. Dec. 317; Judd v. Dike, 30 Minn. 380, 15 N. W. 672; Buzzell v. Snell, 25 N. H. 474; Stuart v. Binsse, 10 Bosw. (N. Y.) 436; Gutta Percha & Rubber Mfg. Co. v. Benedict, 37 N. Y. Super. Ct. 430; Spencer v. Pierce, 5 R. I. 63; Hauxhurst v. Hovey, 26 Vt. 544; Foote v. Blanchard, 6 Allen (Mass.) 221, 83 Am. Dec. 624. Interest is recoverable on legacies from the time when they should have been paid. Custis v. Adkins, 1 Houst. (Del.) 382, 68 Am. Dec. 422; Hennion's Ex'rs v. Jacobus, 27 N. J. Eq. 28; Vermont State Baptist Convention v. Ladd, 58 Vt. 95, 4 Atl. 634; Levering & Garrigues Co. v. Century Holding Co., 165 App. Div. 174, 150 N. Y. Supp. 649.

There appears to be no reason for this rule other than that stated in note 1, ante. In some states it is not followed. Stoddard v. Sagal, 86 Conn. 346, 85 Atl. 519. Some cases have refused interest where a debt is disputed in good faith. Hurley v. Tucker, 128 App. Div. 580, 112 N. Y. Supp. 980, affirmed 198 N. Y. 534, 92 N. E. 1087; 22 Cyc. 1515. Contra: Martin v. Silliman, 53 N. Y. 615. Doubtless the general rule is contra.

<sup>57</sup> Gray v. Central R. Co., 157 N. Y. 483, 52 N. E. 555; Sloan v. Baird, 12 App. Div. 486, 42 N. Y. Supp. 38; Mansfield v. New York Cent. & H. R. R. Co., 114 N. Y. 331, 21 N. E. 735, 1037, 4 L. R. A. 566; McMaster v. State, 108 N. Y. 542, 15 N. E. 417; Marks Hat Co. v. Slatnik (Iowa) 154 N. W. 756.

<sup>58</sup> Lawrence v. Church, 128 N. Y. 324, 332, 28 N. E. 499; Mead v. Wheeler, 13 N. H. 351. But see Yellow Pine Lumber Co. v. Carroll, 76 Tex. 135, 13 S. W. 261.

tually liquidated, are, at the time of breach, and from facts then known, easily ascertainable.<sup>59</sup>

Thus, in *Van Rensselaer v. Jewett*,<sup>60</sup> the action was for rent payable in specific articles, with no sum mentioned; and in *Dana v. Fiedler*<sup>61</sup> the action was for the recovery of damages for nondelivery of a quantity of madder pursuant to contract, the value of which could be ascertained by reference to market values; and in both cases interest was allowed.

### *Unliquidated Damages*

In *McMaster v. State*<sup>62</sup> the claim was for damages founded upon a breach of contract for the supply of materials for and services in the construction of a public building. The damages resulted from the refusal of the state to permit the contractor to proceed with the work to its completion, as provided by the contract, and such damages consisted of a loss of profits which would have been realized by performance of the work at the contract price. The court held that interest was not allowable, even from the time of the commencement of the action or proceeding, because the claim was unliquidated, and "there was no possible way for the state to adjust the same and ascertain the amount which it was liable to pay." *White v. Miller*<sup>63</sup> was an action to recover damages for breach of warranty upon a sale of a quantity of cabbage seed. The referee, upon the first trial, allowed interest upon the damages from the time the crop would have been har-

<sup>59</sup> *McMahon v. New York & E. R. Co.*, 20 N. Y. 463; *Mansfield v. New York Cent. & H. R. R. Co.*, 114 N. Y. 331, 21 N. E. 735, 1037, 4 L. R. A. 566; *Sipperly v. Stewart*, 50 Barb. (N. Y.) 62; *Smith v. Velie*, 60 N. Y. 106. In an action for breach of a contract to deliver property at a certain time, interest is recoverable on the value of the property from that time. *Pujol v. McKinlay*, 42 Cal. 559; *Bickell v. Colton*, 41 Miss. 368; *Bicknell v. Waterman*, 5 R. I. 43; *Merryman v. Criddle*, 4 Munf. (Va.) 542; *Enders v. Board of Public Works*, 1 Grat. (Va.) 364, 390; *Van Rensselaer's Ex'rs v. Jewett*, 5 Denio (N. Y.) 135; *Van Rensselaer v. Jewett*, 2 N. Y. 135, 51 Am. Dec. 275; *Van Rensselaer v. Jones*, 2 Barb. (N. Y.) 643; *Livingston v. Miller*, 11 N. Y. 80; *McKenney v. Haines*, 63 Me. 74; *Savannah & C. R. Co. v. Callahan*, 56 Ga. 331; *Inhabitants of Canton v. Smith*, 65 Me. 203-209. Contra, *Dobenspeck v. Armel*, 11 Ind. 31. Where the goods have not been paid for, interest is recoverable on the difference between the contract and the market price. *Dana v. Fiedler*, 12 N. Y. 40, 62 Am. Dec. 130; *Cease v. Cockle*, 76 Ill. 484; *Driggers v. Bell*, 94 Ill. 223; *Thomas v. Wells*, 140 Mass. 517, 5 N. E. 485; *Clark v. Dales*, 20 Barb. (N. Y.) 42; *Hamilton v. Ganyard*, 34 Barb. (N. Y.) 204; *Fishell v. Winans*, 38 Barb. (N. Y.) 228; *Currie v. White*, 6 Abb. Prac. N. S. (N. Y.) 352, 385; *People v. Willox*, 153 App. Div. 759, 138 N. Y. Supp. 1055, affirmed 207 N. Y. 743, 101 N. E. 174.

<sup>60</sup> 2 N. Y. 135, 51 Am. Dec. 275.

<sup>61</sup> 12 N. Y. 40, 62 Am. Dec. 130.

<sup>62</sup> 108 N. Y. 542, 15 N. E. 417.

<sup>63</sup> 71 N. Y. 118, 27 Am. Rep. 13; 78 N. Y. 393, 34 Am. Rep. 544.



vested. The court held that was error, because "the demand was unliquidated, and that the amount could not be determined by computation simply, or reference to market values." On the second trial the plaintiffs were allowed to recover interest upon the amount of damages from the time of the commencement of the action. This was held to be error, for, even when the action was begun, "the claim is no less unliquidated, contested, and uncertain."<sup>64</sup>

In an action by a lawyer to recover the reasonable value of his services, interest is allowed, although not strictly within the rule.<sup>65</sup>

*Actions for a tort* are, in respect to an allowance of interest, divided into three classes:

(a) "There is a class of cases sounding in tort, in which interest is not allowable at all; such as assault and battery, slander, libel, seduction, false imprisonment," etc.<sup>66</sup> And interest is not allowed in any case on exemplary damages;<sup>67</sup> nor where the damages caused by a tort are not only unascertained, but unascertainable, save by the enlightened conscience of a jury, interest cannot be recovered.<sup>68</sup>

(b) "There is another class in which the law gives interest on the loss as a part of the damages, such as trover, trespass, replevin," etc.<sup>69</sup> In an action against a common carrier for the loss of goods, interest is allowed on their value.<sup>70</sup> "In an action for destroying or carrying off property, the plaintiff recovers interest from the time of the wrongful act."<sup>71</sup> In actions of replevin, where the prevailing party recovers, not the property itself, but its value, interest is allowed from the time

<sup>64</sup> See, also, *Gray v. Central R. Co.*, 157 N. Y. 483, 52 N. E. 555.

<sup>65</sup> *Carricarti v. Blanco*, 121 N. Y. 233, 24 N. E. 284. See *Sutherland, Dam.* (4th Ed.) § 324, where it is said that the tendency is to allow interest as compensation wherever the use of money is unlawfully withheld.

<sup>66</sup> *Wilson v. City of Troy*, 135 N. Y. 96, 105, 32 N. E. 44, 18 L. R. A. 449, 31 Am. St. Rep. 817; *Louisville & N. R. Co. v. Wallace*, 91 Tenn. 35, 17 S. W. 882, 14 L. R. A. 548.

<sup>67</sup> *Ratteree v. Chapman*, 79 Ga. 574, 4 S. E. 684.

<sup>68</sup> *Western & A. R. Co. v. Young*, 81 Ga. 397, 7 S. E. 912, 12 Am. St. Rep. 320; *Pittsburgh Southern Ry. Co. v. Taylor*, 104 Pa. 306, 49 Am. Rep. 580.

In these cases damages are assessed to the time of the trial or for all time in a lump sum and there is no basis for an award of interest.

<sup>69</sup> *Wilson v. City of Troy*, 135 N. Y. 96, 105, 32 N. E. 44, 18 L. R. A. 449, 31 Am. St. Rep. 817; *Elkins v. East India Co.*, 1 P. Wms. 395; *Hamer v. Hathaway*, 33 Cal. 117; *Clark v. Whitaker*, 19 Conn. 320, 48 Am. Dec. 160; *Tuller v. Carter*, 59 Ga. 395; *Hayden v. Bartlett*, 35 Me. 203; *Negus v. Simpson*, 99 Mass. 388; *Bradley Lumber Co. v. Hamilton*, 117 Ark. 127, 173 S. W. 848.

<sup>70</sup> *Mobile & M. Ry. Co. v. Jurey*, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527; *Parrott v. Housatonic R. Co.*, 47 Conn. 575; *Mote v. Chicago & N. W. R. Co.*, 27 Iowa, 22, 1 Am. Rep. 212; *McCormick v. Pennsylvania Cent. R. Co.*, 49 N. Y. 303.

<sup>71</sup> 1 Sedg. Meas. Dam. § 316; *Fail's Adm'r v. Presley's Adm'r*, 50 Ala. 342.

the property was taken.<sup>72</sup> Damages for detention and interest cannot both be recovered.<sup>73</sup> Some courts allow interest in cases of negligence as a matter of law,<sup>74</sup> while others leave it to the discretion of the jury.<sup>75</sup>

(c) There is "still a third class in which interest cannot be recovered as of right, but may be allowed in the discretion of the jury, according to the circumstances of the case"; as, for example, where the value of property is diminished by an injury wrongfully inflicted.<sup>76</sup> In some jurisdictions interest in such cases is recoverable as a matter of law;<sup>77</sup> and in others, not at all.<sup>78</sup>

The foregoing classification is based in part upon historical reasons and in part upon a tendency of courts in modern times to extend the right to recover interest on demand far beyond the limits within which that right was originally confined. "What seemed to be the demands of justice did not permit the [original] principle to remain stationary, and hence it has been for years in a state of constant evolution. This, in some measure, accounts for many of the apparently contradictory views to be found in the adjudged cases."<sup>79</sup>

Accordingly, it will be found that in some states interest which would be allowable under the principles above stated cannot be recovered. When the matter appears to have been regulated by a state statute, and the statute has been interpreted by its highest court, the regulation of the statute will be followed in the courts of the United States.<sup>80</sup>

<sup>72</sup> *Yelton v. Slinkard*, 85 Ind. 190; *Blackie v. Cooney*, 8 Nev. 41; *Brizsee v. Maybee*, 21 Wend. (N. Y.) 144; *McDonald v. Scaife*, 11 Pa. 381, 51 Am. Dec. 556; *Bigelow v. Doolittle*, 36 Wis. 115.

<sup>73</sup> *McCarty v. Quimby*, 12 Kan. 494.

<sup>74</sup> *Parrott v. Knickerbocker Ice Co.*, 46 N. Y. 361, 369; *Alabama G. S. R. Co. v. McAlpine*, 75 Ala. 113; *Arthur v. C., R. I. & P. Ry. Co.*, 61 Iowa, 648, 17 N. W. 24.

<sup>75</sup> *Western & A. R. Co. v. McCauley*, 68 Ga. 818; *Chicago & N. W. Ry. Co. v. Shultz*, 55 Ill. 421; *Frazer v. Bigelow Carpet Co.*, 141 Mass. 126, 4 N. E. 620.

<sup>76</sup> *Wilson v. City of Troy*, 135 N. Y. 96, 105, 32 N. E. 44, 18 L. R. A. 449, 31 Am. St. Rep. 817; 1 Sedg. Meas. Dam. §§ 317, 320; *Mairs v. Manhattan Real Estate Ass'n*, 89 N. Y. 498; *Pennsylvania S. V. R. Co. v. Ziemer*, 124 Pa. 560, 17 Atl. 187; *Moore v. New York El. R. Co.*, 126 N. Y. 671, 673, 27 N. E. 791; *Greenfield Sav. Bank v. Simons*, 133 Mass. 415; *Regan v. City of New York*, 175 App. Div. 861, 162 N. Y. Supp. 400.

<sup>77</sup> *Chamberlain v. City of Des Moines*, 172 Iowa, 500, 154 N. W. 766; *Bag-nall v. City of Milwaukee*, 156 Wis. 642, 146 N. W. 791.

<sup>78</sup> *Geohagan v. Union Elevated R. Co.*, 266 Ill. 482, 107 N. E. 786, Ann. Cas. 1916B, 762.

<sup>79</sup> *Wilson v. City of Troy*, 135 N. Y. 96, 103, 32 N. E. 44, 18 L. R. A. 449, 31 Am. St. Rep. 817.

<sup>80</sup> *New York, L. E. & W. R. Co. v. Estill*, 147 U. S. 619, 13 Sup. Ct. 444, 37 L. Ed. 292; *Kimes v. St. Louis, I. M. & S. Ry. Co.*, 85 Mo. 611; *State v. Harrington*, 44 Mo. App. 297; *Lincoln v. Claffin*, 7 Wall. 132, 139, 19 L. Ed. 106.

### 3. INTEREST FROM DEMAND OR SUIT

In an action for breach of a contract, if the amount is, by the terms of the contract and the nature of the given circumstances, liquidated, or capable of being ascertained, and is then due and payable without demand, interest begins to accrue at once, except in jurisdictions where, as already stated, interest is not allowed, unless the contract so provides, between default and judgment.<sup>81</sup> But if, by the express or implied terms of the contract, the principal sum is not to become payable until demand—as, for example, in the case of a deposit—then, until such demand, there can be no default, and therefore no interest can be allowed as damages until demand is made.<sup>82</sup>

Where demand is necessary to establish a conversion, interest is recoverable only from demand.<sup>83</sup>

If goods withheld are returned, and damages are allowed for injury and depreciation, and no conversion is alleged, no interest can be allowed for the period of detention.<sup>84</sup>

In New York it has been held that, where rents have been paid quarterly, the interest should be computed quarterly.<sup>85</sup> But the Massachusetts courts have held otherwise.<sup>86</sup> And, if the amount recoverable is wholly unliquidated, and cannot be ascertained until verdict or judgment, interest can usually be recovered only from that time, and not from demand;<sup>87</sup> though a claim for compensation for services, resting solely on quantum meruit, the amount being wholly uncertain, carries interest from a demand for a specific amount claimed as due, for then the defendant is in default.<sup>88</sup>

In an action upon an open account for goods or services, interest runs from demand.<sup>89</sup>

<sup>81</sup> *Lawrence v. Church*, 128 N. Y. 324, 28 N. E. 499; *Mead v. Wheeler*, 13 N. H. 351.

<sup>82</sup> *Sheldon v. Heaton*, 88 Hun, 535, 34 N. Y. Supp. 856; *Whitcomb v. Harris*, 90 Me. 206, 38 Atl. 138; *Irlbacker v. Roth*, 25 App. Div. 290, 49 N. Y. Supp. 538; *Bell v. Rice*, 50 Neb. 547, 70 N. W. 25; *Zautcke v. North Milwaukee Town-Site Co.*, 95 Wis. 21, 69 N. W. 978.

<sup>83</sup> *Garrard v. Dawson*, 49 Ga. 434; *Northern Transp. Co. of Ohio v. Sellick*, 52 Ill. 249; *Johnson v. Sumner*, 1 Metc. (Mass.) 172; *Schwerin v. McKie*, 51 N. Y. 180, 10 Am. Rep. 581.

<sup>84</sup> *Wilson v. Sullivan*, 17 Utah, 341, 53 Pac. 994.

<sup>85</sup> *Jackson v. Wood*, 24 Wend. (N. Y.) 443.

<sup>86</sup> *Hodgkins v. Price*, 141 Mass. 162, 5 N. E. 502.

<sup>87</sup> *Day v. New York Cent. R. Co.*, 22 Hun (N. Y.) 412; *Crawford v. Mail & Express Pub. Co.*, 22 App. Div. 54, 47 N. Y. Supp. 747. Compare *Kuhn v. McKay*, 7 Wyo. 42, 51 Pac. 205; *Vietti v. Nesbitt*, 22 Nev. 390, 41 Pac. 151.

<sup>88</sup> *Stoddard v. Sagal*, 86 Conn. 346, 85 Atl. 519; *Carricarti v. Blanco*, 121 N. Y. 230, 24 N. E. 284. Compare *White v. Miller*, 78 N. Y. 393, 395, et seq., 34 Am. Rep. 544, and the cases there reviewed.

<sup>89</sup> See last note; also *James v. Post*, 40 App. Div. 162, 57 N. Y. Supp. 834.

Where the plaintiff has made a reasonable demand for an accounting, and defendant fails to accede to it, or to pay the amount which would have been found due, he is in default from the date of demand, and chargeable with interest.<sup>90</sup>

A demand for a sum assumed to be due may be considered a sufficient demand for a settlement, if the sum is a reasonable one.<sup>91</sup>

In a case where the claim is such as not to draw interest from an earlier date, interest can be allowed from the commencement of an action only when the claim is such that the interest could be set running by a demand; the commencing of the action in such a case being a sufficient demand.<sup>92</sup>

Where defendant reduces plaintiff's recovery by a recoupment, the demands on both sides are unliquidated, and interest on the balance is usually allowed only from verdict.<sup>93</sup>

#### 4. COMPOUND INTEREST

Interest computed upon interest is called "compound interest." It is not favored in the law, and it is a general rule that compound interest cannot be recovered.<sup>94</sup>

There are, however, a number of exceptions to this general rule. Compound interest can usually be recovered only upon some new and independent agreement, made upon a good consideration. The right to retain it when voluntarily paid is not disputed, and a recovery of it upon express contract, made after the interest has accrued, upon a

*Hefferlin v. Karlman*, 29 Mont. 139, 74 Pac. 20; *Harding, Whitman & Co. v. York Knitting Mills* (C. C.) 142 Fed. 228. And see *Sutherland, Dam.* (4th Ed.) § 350.

<sup>90</sup> *Gray v. Van Amringe*, 2 Watts & S. (Pa.) 128; *Mygatt v. Wilcox*, 45 N. Y. 306, 6 Am. Rep. 90; *Robbins v. Carll*, 93 N. Y. 656. See 22 Cyc. 1542.

<sup>91</sup> *Adams v. Ft. Plain Bank*, 36 N. Y. 255; *Mygatt v. Wilcox*, 45 N. Y. 306, 6 Am. Rep. 90; *Hand v. Church*, 39 Hun (N. Y.) 303. Contra: *People v. Supervisors of Delaware*, 9 Abb. Prac. N. S. (N. Y.) 408. A demand for an unreasonably large sum will not put defendant in default. *Goff v. Inhabitants of Rehoboth*, 2 Cush. (Mass.) 475; *Shipman v. State*, 44 Wis. 458.

<sup>92</sup> *White v. Miller*, 78 N. Y. 393, 398, 34 Am. Rep. 544; *Crawford v. Mail & Express Pub. Co.*, 22 App. Div. 54, 47 N. Y. Supp. 747; *Patterson v. Missouri Glass Co.*, 72 Mo. App. 492. Compare *Goddard v. Foster*, 17 Wall. 123, 21 L. Ed. 589; *Mercer v. Vose*, 67 N. Y. 56; *Hand v. Church*, 39 Hun (N. Y.) 303; *Gammon v. Abrams*, 53 Wis. 323, 10 N. W. 479.

<sup>93</sup> *Brady v. Wilcoxson*, 44 Cal. 239; *Still v. Hall*, 20 Wend. (N. Y.) 51; *McMaster v. State*, 108 N. Y. 542, 15 N. E. 417.

<sup>94</sup> *Mason v. Callender*, 2 Minn. 350 (Gil. 302), 72 Am. Dec. 102; *State of Connecticut v. Jackson*, 1 Johns. Ch. (N. Y.) 13, 7 Am. Dec. 471; *Whitcomb v. Harris*, 90 Me. 206, 38 Atl. 138; *Daniell v. Sinclair*, 6 App. Cas. 181.

sufficient consideration, is allowed. But a provision that future interest, if not paid, shall be taken as principal, and bear interest, is void.<sup>95</sup>

Engagements to pay interest in future upon interest already accrued have a consideration in forbearing and giving day of payment for moneys presently due. But a like promise, to operate not only in futuro, but also retrospectively, unsupported by any consideration (if one exists) other than the moral consideration resulting from the fact that the interest is in arrear and unpaid, is invalid.<sup>96</sup> But, if there is other sufficient consideration, such a retrospective agreement is valid.<sup>97</sup>

"Compound interest is recoverable upon merchants' accounts of mutual dealings, upon an express agreement, or when an agreement may be implied from usage or custom, for the reason that an extension of time for payment is implied, and the transaction is fair, as the balance may change, and the benefit of the usage be mutual."<sup>98</sup>

But the law will not imply a promise to pay compound interest, except under peculiar circumstances and upon some evidence from which an agreement to turn the interest into principal to bear interest for the future can be inferred.<sup>99</sup>

Other exceptions to the rule against the allowance of interest on interest are found in the case of coupons (under certain circumstances; or, in some states, in all cases), as already stated; and where compound interest is allowed as a punishment for a fraudulent breach of trust, or other gross or willful wrong.<sup>1</sup>

Compound interest is never allowed by way of damages.<sup>2</sup> But

<sup>95</sup> *Young v. Hill*, 67 N. Y. 162, 23 Am. Rep. 99; *Bowman v. Neely*, 151 Ill. 37, 37 N. E. 840; *Lord Ossulston v. Lord Yarmouth*, 2 Salk. 449; *Ex parte Bevan*, 9 Ves. 223; *Guernsey v. Rexford*, 63 N. Y. 631; *Grimes v. Blake*, 16 Ind. 160; *Doe v. Warren*, 7 Me. (7 Greenl.) 48; *Thayer v. Wilmington Star Mining Co.*, 105 Ill. 540; *Reusens v. Arkenburgh*, 135 App. Div. 75, 119 N. Y. Supp. 821; *Sanford v. Lunquist*, 80 Neb. 408, 114 N. W. 279; *Inhabitants of Tisbury v. Vineyard Haven Water Co.*, 193 Mass. 196, 79 N. E. 256.

<sup>96</sup> *Young v. Hill*, 67 N. Y. 162, 23 Am. Rep. 99; *Ehle v. Judson*, 24 Wend. (N. Y.) 97; *Van Benschooten v. Lawson*, 6 Johns. Ch. (N. Y.) 313, 10 Am. Dec. 333. Compare *Stewart v. Petree*, 55 N. Y. 621, 14 Am. Rep. 352; *Rose v. City of Bridgeport*, 17 Conn. 243, 247; *Newburger-Morris Co. v. Talcott*, 172 App. Div. 485, 158 N. Y. Supp. 785.

<sup>97</sup> *Tillotson v. Nye*, 88 Hun, 101, 34 N. Y. Supp. 606.

<sup>98</sup> *Kelly, Usury*, 49; *Young v. Hill*, 67 N. Y. 167, 171, 23 Am. Rep. 99; *Lord Clancarty v. Latouche*, 1 Ball & B. 429; *Von Hemert v. Porter*, 11 Metc. (Mass.) 210; *Carpenter v. Welch*, 40 Vt. 251; *Miller v. Billington*, 194 Pa. 452, 45 Atl. 372.

<sup>99</sup> *Young v. Hill*, 67 N. Y. 162, 172, 23 Am. Rep. 99; *Newburger-Morris Co. v. Talcott*, *supra*.

<sup>1</sup> *Ackerman v. Emott*, 4 Barb. (N. Y.) 626; *Merrifield v. Longmire*, 66 Cal. 180, 4 Pac. 1176; *State v. Howarth*, 48 Conn. 207; *Jennison v. Hapgood*, 10 Pick. (Mass.) 77; *Kernochan, In re*, 104 N. Y. 618, 11 N. E. 149.

<sup>2</sup> *Lewis v. Small*, 75 Me. 323. But see cases in note 1.

where, by the terms of a contract, interest is due at a fixed day, it is a debt; and, if not paid when due, interest thereon may be recovered as damages.<sup>3</sup> This secondary interest does not, in turn, bear interest.<sup>4</sup>

## 5. PARTIAL PAYMENTS—METHOD OF COMPUTATION

The rule for casting interest when partial payments have been made is to apply the payment, in the first place, to the discharge of the interest then due. If the payment exceeds the interest, the surplus goes towards discharging the principal, and the subsequent interest is to be computed on the balance of principal remaining due. If the payment be less than the interest, the surplus of interest must not be taken to augment the principal; but interest continues on the former principal until the period when the payments, taken together, exceed the interest due, and then the surplus is to be applied towards discharging the principal; and interest is to be computed on the balance, as aforesaid.<sup>5</sup>

## 6. ACTION FOR INTEREST ONLY

Where interest is recoverable as damages, it does not form the basis of an action, but is an incident to the recovery of the principal debt. And therefore, if the principal sum has been paid, so that, as to it, an action brought cannot be maintained, the opportunity to acquire a right to damages is lost. This principle applies, for example, where one who has illegally been required to pay a tax receives back and accepts the amount thus paid from the government, without protest. He cannot thereafter recover interest thereon as damages.<sup>6</sup>

<sup>3</sup> *Calhoun v. Marshall*, 61 Ga. 275, 34 Am. Rep. 99; *Mann v. Cross*, 9 Iowa, 327; *Talliaferro's Ex'rs v. King's Adm'r*, 9 Dana (Ky.) 331, 35 Am. Dec. 140; *Peirce v. Rowe*, 1 N. H. 179; *Bledsoe v. Nixon*, 69 N. C. 89, 12 Am. Rep. 642; *Lanahan v. Ward*, 10 R. I. 299; *Catlin v. Lyman*, 16 Vt. 44 (contra, *Broughton v. Mitchell*, 64 Ala. 210); *Rose v. City of Bridgeport*, 17 Conn. 243; *Leonard v. Villars' Adm'r*, 23 Ill. 377; *Banks v. McClellan*, 24 Md. 62, 87 Am. Dec. 594 (contra, *Fitzhugh v. McPherson*, 3 Gill [Md.] 408); *Hastings v. Wiswall*, 8 Mass. 455; *Corrigan v. Trenton Delaware Falls Co.*, 5 N. J. Eq. 232, 245; *Young v. Hill*, 67 N. Y. 162, 23 Am. Rep. 99 (contra, *Howard v. Farley*, 3 Rob. [N. Y.] 599); *Stokely v. Thompson*, 34 Pa. 210.

<sup>4</sup> *Wheaton v. Pike*, 9 R. I. 132, 98 Am. Dec. 377, 11 Am. Rep. 227; *Vaughan v. Kennan*, 38 Ark. 114; *Bowman v. Neely*, 151 Ill. 37, 37 N. E. 840.

In *Sutherland, Dam.* (4th Ed.) § 375, it is said that the general rule is that interest will not be allowed on unpaid installments of interest (citing *Young v. Hill*, 67 N. Y. 162, 23 Am. Rep. 99), but that there are many cases contra.

<sup>5</sup> *Connecticut v. Jackson*, 1 Johns. Ch. (N. Y.) 13, 17, 7 Am. Dec. 471; *Peyser v. Myers*, 135 N. Y. 599, 607, 32 N. E. 699; *Haffey v. Lynch*, 193 N. Y. 67, 85 N. E. 817; *Holcombe v. Holcombe*, 74 N. J. Law, 257, 65 Atl. 855.

<sup>6</sup> *Stewart v. Barnes*, 153 U. S. 462, 14 Sup. Ct. 849, 38 L. Ed. 781; also, *Pacific R. Co. v. U. S.*, 158 U. S. 118, 15 Sup. Ct. 766, 39 L. Ed. 918; *Moore v.*

Where interest is secured by contract, or is allowed, not as damages, but as part of the compensation—for example, for property taken for public purposes—an action may be maintained for it, although the principal has been paid.<sup>7</sup>

And where both principal and interest are due and payable, the mere fact that the debtor pays, and the creditor receives, a sum equal to the principal only, does not prevent the creditor from suing the debtor for the unpaid balance, for by itself alone it does not justify an inference of acceptance in full satisfaction.<sup>8</sup> If, in such a case, the payments are made generally on account, interest is first extinguished thereby, and accordingly the unsatisfied balance, even though exactly equaling the interest, may be sued for as principal.<sup>9</sup> And, indeed, whether acceptance of the principal alone extinguishes the claim for the interest would seem to depend upon the intention of the parties.<sup>10</sup>

## 7. LIABILITY OF TRUSTEE FOR INTEREST

If a trustee holds funds which can and should be invested, and through fraud, or mismanagement, or other breach of trust he does not invest them, or invests them in his own business, or that of others, or in commercial or manufacturing enterprises, or speculative ventures, he will be charged with interest, as a general rule;<sup>11</sup> or, at the option

Fuller, 47 N. C. 205; Tillotson v. Preston, 3 Johns. (N. Y.) 229; Dixon v. Parkes, 1 Esp. 110; Churcher v. Stringer, 2 Barn. & Adol. 777; Cutter v. Mayor, etc., of City of New York, 92 N. Y. 166; Hamilton v. Van Rensselaer, 43 N. Y. 244; Hayes v. Chicago, M. & St. P. Ry. Co., 64 Iowa, 753, 19 N. W. 245; Southern Cent. R. Co. v. Town of Moravia, 61 Barb. (N. Y.) 181; Consequa v. Fanning, 3 Johns. Ch. (N. Y.) 364; Gillespie v. City of New York, 3 Edw. Ch. (N. Y.) 512; Jacot v. Emmett, 11 Paige Ch. (N. Y.) 142; Succession of Mann, 4 La. Ann. 28; Succession of Anderson, 12 La. Ann. 95; American Bible Soc. v. Wells, 68 Me. 572, 28 Am. Rep. 82; Tenth Nat. Bank v. Mayor, etc., of City of New York, 4 Hun (N. Y.) 429.

<sup>7</sup> Robbins v. Cheek, 32 Ind. 328, 2 Am. Rep. 348; Stone v. Bennett, 8 Mo. 41; Fake v. Eddy's Ex'r, 15 Wend. (N. Y.) 76; King v. Phillips, 95 N. C. 245, 59 Am. Rep. 238; Devlin v. City of New York, 131 N. Y. 123, 30 N. E. 45; Smith v. City of Buffalo (Sup.) 39 N. Y. Supp. 881.

Contractual interest is not merely an incident, but is as much part of the debt as the principal. Sutherland, Dam. (4th Ed.) § 271. Interest as damages is strictly incidental. Id. § 272; Griffiths v. Powers, 216 Mass. 169, 103 N. E. 468.

<sup>8</sup> People v. New York Co., 5 Cow. (N. Y.) 331.

<sup>9</sup> Id. See, also, National Bank of Commonwealth v. Mechanics' Nat. Bank, 94 U. S. 440, 24 L. Ed. 176.

<sup>10</sup> Shepard v. City of New York, 216 N. Y. 251, 110 N. E. 435, Ann. Cas. 1917C, 1062.

<sup>11</sup> Price v. Holman, 135 N. Y. 124, 32 N. E. 124; In re Barnes, 140 N. Y. 468, 471, 35 N. E. 653; Cook v. Lowry, 95 N. Y. 103, 113; Reynolds v. Sisson,

of the beneficiary, with the profits earned.<sup>12</sup> But the beneficiary cannot have rests at selected periods, so as to claim profits when they exceeded interest, and interest when it exceeded profits. If profits have first exceeded interest, and then there has been actual loss, if the beneficiary claims profits he can only recover net profits for the entire period.<sup>13</sup> And where the trustee has made separate unauthorized investments of separate parts of the fund, the beneficiary's right to elect applies to each investment by itself, so that, according as his interest may appear, he may approve some and accept the profits, and reject others and insist on legal interest.<sup>14</sup> And he may so elect even during the pendency of the trust.<sup>15</sup> And a beneficiary is not required to keep watch of all the trustee's acts, so as to be prepared at once to protest in case of improper investments. It is the duty of the trustee, and not of the beneficiary, to attend to the investment of the estate.<sup>16</sup> But it may be the beneficiary's duty, if he proposes to object to the trustee's failure to invest small sums, to find and call to his attention suitable opportunities for investing the same.<sup>17</sup> And the mere fact that the trustee deposits trust moneys with his own, or uses them in his own business, does not necessarily render him liable for interest; as, for instance, where the funds are too small to make it practicable to invest them, or where the trustee may be called on at any moment to pay over the fund to the beneficiary: In order to make him liable for interest, there must be superadded a breach of trust, a neglect or refusal to invest the funds at the time or in the mode which the trust instrument or the law itself has pointed out.<sup>18</sup>

78 Hun, 595, 29 N. Y. Supp. 492; *In re Jones*, 143 App. Div. 692, 128 N. Y. Supp. 215; *Albert v. Sanford*, 201 Mo. 117, 99 S. W. 1068; *Brigham v. Morgan*, 185 Mass. 27, 69 N. E. 418.

Compound interest for fraud or misfeasance. See above cases and *Sutherland, Dam.* (4th Ed.) p. 1119 et seq. See post, p. 329.

<sup>12</sup> *Utica Ins. Co. v. Lynch*, 11 Paige (N. Y.) 520; *In re Myers*, 131 N. Y. 409, 30 N. E. 135; *Deobold v. Oppermann*, 111 N. Y. 531, 538, 19 N. E. 94, 2 L. R. A. 644, 7 Am. St. Rep. 760; *King v. Talbot*, 40 N. Y. 76, 86; *Wilmerding v. McKesson*, 103 N. Y. 329, 8 N. E. 665.

<sup>13</sup> *Baker v. Disbrow*, 18 Hun (N. Y.) 29, affirmed in 79 N. Y. 631.

<sup>14</sup> *King v. Talbot*, 40 N. Y. 76, 91. Compare *In re Porter's Estate*, 5 Misc. Rep. 274, 25 N. Y. Supp. 822.

<sup>15</sup> *Gillespie v. Brooks*, 2 Redf. Sur. (N. Y.) 349, 360.

<sup>16</sup> *In re Foster's Will*, 15 Hun (N. Y.) 387, 393.

<sup>17</sup> *Rapalje v. Norsworthy's Ex'rs*, 1 Sandf. Ch. (N. Y.) 399, 405.

<sup>18</sup> *Rapalje v. Norsworthy's Ex'rs*, 1 Sandf. Ch. (N. Y.) 399, 404; *Jacot v. Emmett*, 11 Paige (N. Y.) 142, 145; *Price v. Holman*, 135 N. Y. 124, 133, 32 N. E. 124; *In re Barnes*, 140 N. Y. 468, 35 N. E. 653; *In re Nesmith*, 140 N. Y. 609, 615-617, 35 N. E. 942; *Shuttleworth v. Winter*, 55 N. Y. 624, 631; *In re Clark's Estate*, 16 Misc. Rep. 405, 39 N. Y. Supp. 722. As to whether, in deciding whether a trustee had in his hands a fund large enough to call for investment thereof, it is permissible to take into account the fact that he held



In a case where a trustee has made use of the funds, but no breach of trust is involved, he will be charged with interest, if it be proved that he has earned interest.<sup>19</sup>

If, when rents and income are due and payable, the beneficiary voluntarily leaves them in the trustee's hands, they do not draw interest.<sup>20</sup>

If a penalty is incurred, owing to the negligent failure of the trustee to pay taxes when due, and is paid by him, he cannot be credited therewith on his accounting.<sup>21</sup>

If commissions are prematurely withdrawn by the trustee, he is chargeable with interest thereon.<sup>22</sup> But not solely on that ground, if they had then been actually earned.<sup>23</sup> If commissions which have been earned, but not allowed, are in good faith withdrawn by the trustee, under an assumption that he is entitled so to do, this mere fact, in the absence of any resulting loss to the estate, is not ground for charging him with interest thereon.<sup>24</sup>

It is only in extraordinary cases that the trustee is charged with compound interest.<sup>25</sup> In *King v. Talbot*<sup>26</sup> it was held that in case of bad faith or willful failure of duty, the highest rate of interest should be imposed; but where, as in that case, a mistake occurs in investing funds, but the trustee acted honestly and in good faith, the rate of interest to be charged rests in a discretion which permits the consideration of all the circumstances, which show that substantial justice can be done to the cestui que trust, by allowing a less rate. Accordingly, following the English rule in such cases of charging 4 per cent. where the legal rate was 5, the court charged the trustee 6 per cent., the

several entirely distinct trust funds, which, if combined, would have afforded such a gross sum, see *Rapalje v. Norsworthy's Ex'rs*, 1 Sandf. Ch. (N. Y.) 399.

<sup>19</sup> *Rapalje v. Norsworthy's Ex'rs*, 1 Sandf. Ch. (N. Y.) 399, 404. As to liability for interest, see, also, note to *Kellett v. Rathbun*, 4 Paige (N. Y. 107; Banks' Ann. Ed.) 102, 109.

<sup>20</sup> *Holley v. S. G.*, 4 Edw. Ch. (N. Y.) 284, 286.

<sup>21</sup> *Stubbs v. Stubbs*, 4 Redf. Sur. (N. Y.) 170.

<sup>22</sup> *In re Peyser*, 5 Dem. Sur. (N. Y.) 244, 247; *Wheelwright v. Wheelwright*, 2 Redf. Sur. (N. Y.) 501; *Freeman v. Freeman*, 4 Redf. Sur. (N. Y.) 211, 215; *United States Trust Co. v. Bixby*, 2 Dem. Sur. (N. Y.) 494. But see *Wyckoff v. Van Siclen*, 3 Dem. Sur. (N. Y.) 75.

<sup>23</sup> *Beard v. Beard*, 140 N. Y. 260, 265, 266, 35 N. E. 488; *Price v. Holman*, 135 N. Y. 124, 32 N. E. 124; *Whitney v. Phoenix*, 4 Redf. Sur. (N. Y.) 180, 195.

<sup>24</sup> *Beard v. Beard*, 140 N. Y. 260, 266, 35 N. E. 488.

<sup>25</sup> *Price v. Holman*, 135 N. Y. 124, 133, 134, 32 N. E. 124. For instances of such charges, see *Hannahs v. Hannahs*, 68 N. Y. 610; *Brown v. Knapp*, 79 N. Y. 136, 145; *Tucker v. McDermott*, 2 Redf. Sur. (N. Y.) 312; *Morgan v. Morgan*, 4 Dem. Sur. (N. Y.) 353, 356; *Smith v. Rockefeller*, 3 Hun (N. Y.) 295; *Reynolds v. Sisson*, 78 Hun, 595, 598, 29 N. Y. Supp. 492; *Utica Ins. Co. v. Lynch*, 11 Paige (N. Y.) 520.

<sup>26</sup> 40 N. Y. 76.

legal rate in New York being, then 7 per cent.<sup>27</sup> In *Clarkson v. De Peyster*<sup>28</sup> it was said that the English rule of "equitable interest" at 1 per cent. less than the legal rate has never been adopted in this state. But the court in *King v. Talbot*, *supra*, say that there is nothing in *Clarkson v. De Peyster*, *supra*, that affects the soundness of their adoption of the English rule.<sup>29</sup>

In cases where there has been an active breach of trust, resulting in loss, but the circumstances are not sufficiently aggravated to call for compound interest, legal interest is commonly charged, but each case must depend to a considerable degree on its own circumstances, as affected by the degree of wrongdoing, the probable actual loss, the personal profits, if any, realized by the trustee, etc.<sup>30</sup>

Somewhat similar principles apply where it is found that one person has been holding funds belonging to another, even though he only knew that the latter claimed them, without knowing the particulars of the claim. For if, instead of setting the fund apart to await the settlement of the dispute, he mingles it with his own funds, and enjoys the benefit of it, he is chargeable with legal interest.<sup>31</sup>

## 8. FEDERAL JURISDICTION—AMOUNT IN CONTROVERSY

In determining whether the amount of a judgment in an action in a federal court is sufficient to warrant a review thereof in the Supreme Court in cases where the right to a review still depends on the amount in controversy, interest accruing before and included in the judgment appealed from is deemed to form part of the amount in controversy.<sup>32</sup> But interest on the judgment appealed from is not included in determining the jurisdictional amount.<sup>33</sup>

In all judgments brought to the Supreme Court for review, the value of the "matter in dispute," where that is still involved, under present

<sup>27</sup> See, also, *Shuttleworth v. Winter*, 55 N. Y. 624; *Haskin v. Teller*, 3 Redf. Sur. (N. Y.) 316, 323.

<sup>28</sup> *Hopk. Ch.* 424, 426.

<sup>29</sup> To the same effect appear to be *Wilmerding v. McKesson*, 103 N. Y. 329, 341, 8 N. E. 665; *Bruen v. Gillet*, 115 N. Y. 10, 21, 21 N. E. 676, 4 L. R. A. 529, 12 Am. St. Rep. 764.

<sup>30</sup> *Cook v. Lowry*, 95 N. Y. 103, 114, and cases there cited; *Morgan v. Morgan*, 4 Dem. Sur. (N. Y.) 353, 356, and cases there cited.

<sup>31</sup> *Moors v. Washburn*, 159 Mass. 172, 34 N. E. 182.

<sup>32</sup> *New York Elevated R. R. v. Fifth Nat. Bank*, 118 U. S. 608, 7 Sup. Ct. 23, 30 L. Ed. 259; *District of Columbia v. Gannon*, 130 U. S. 227, 9 Sup. Ct. 508, 32 L. Ed. 922; *The Patapsco*, 12 Wall. 451, 20 L. Ed. 457; *The Rio Grande*, 19 Wall. 178, 22 L. Ed. 60.

<sup>33</sup> *Knapp v. Banks*, 2 How. 73, 11 L. Ed. 184; *Western Union Telegraph Co. v. Rogers*, 93 U. S. 565, 566, 23 L. Ed. 977.

statutes, is determined by the amount due at the time of the judgment brought there to be reviewed, namely, the judgment of the intermediate appellate court, and not at the time of the judgment of the trial court; and thus the total amount due included interest on the original judgment, if it bore interest, until the date of that of the intermediate appellate court.<sup>34</sup> And where in an action brought in a state court, and removed to the federal court, a judgment is entered which, in accordance with the statutes of the state, includes interest upon the amount of the verdict, from its date, until the entry of judgment, the total amount of the judgment thus composed determines the question whether the amount involved is sufficient to give the federal Supreme Court jurisdiction to review it.<sup>35</sup>

## 9. REMISSION OF INTEREST AWARDED

If interest is erroneously awarded or allowed, and is included in a judgment, the appellate court may allow the appellee, if he wishes, to remit the interest, and may, where that is the only reversible error, affirm the judgment appealed from upon condition that such remission be made.<sup>36</sup>

<sup>34</sup> *Zeckendorf v. Johnson*, 123 U. S. 617, 8 Sup. Ct. 261, 31 L. Ed. 277; *Keller v. Ashford*, 133 U. S. 610, 10 Sup. Ct. 494, 33 L. Ed. 667; *Benson Mining & Smelting Co. v. Alta Mining & Smelting Co.*, 145 U. S. 428, 12 Sup. Ct. 877, 36 L. Ed. 762.

<sup>35</sup> *Massachusetts Ben. Ass'n v. Miles*, 137 U. S. 689, 11 Sup. Ct. 234, 34 L. Ed. 834. See, also, U. S. Sup. Ct. Rule 23 (137 U. S. 691, 692, 3 Sup. Ct. xiii); *Baltimore & O. R. Co. v. Griffith*, 159 U. S. 605, 16 Sup. Ct. 105, 40 L. Ed. 274.

<sup>36</sup> *Washington & G. R. Co. v. Harmon*, 147 U. S. 571, 13 Sup. Ct. 557, 37 L. Ed. 284; *Upham v. Dickinson*, 50 Ill. 97; *Whitehead v. Kennedy*, 69 N. Y. 462; *Durkes v. Town of Union*, 38 N. J. Law, 21. Compare dissenting opinions in *Burdick v. Missouri Pac. Ry. Co.*, 123 Mo. 221, 27 S. W. 453, 26 L. R. A. 384, 45 Am. St. Rep. 528; and see *Suth. Dam.* § 460; *Carlisle v. Callahan*, 78 Ga. 320, 2 S. E. 751.

## USURY

### 10. USURY DEFINED

Where money or property is exacted or reserved by agreement for the loan or forbearance of money in excess of the legal rate of interest fixed by statute, the agreement is usurious, and the money or property thus exacted or reserved in excess is termed usury. The latter term is also applied to the act of loaning money at a usurious rate.

### 11. USURIOUS INTENT ESSENTIAL

Usury consists in the corrupt agreement of the parties by which more than lawful interest is to be paid. To constitute usury, there must be a usurious or corrupt intent. When, at the time of an agreement for a loan, nothing is said as to the rate of interest, the law implies it to be that limited by statute. To increase or alter it, a special agreement is necessary.<sup>37</sup>

Thus the accidental inclusion of an extra sum, neither principal nor interest, in the amount for which a note is given, and where it is the intention of the parties to provide for the payment of principal and of legal interest only, does not render the note usurious. As to the surplus item, it is without consideration, but it is not usury.<sup>38</sup>

The same principle applies to mistakes in attempting to eliminate usury by recomputing and giving a new security.<sup>39</sup>

### 12. LOAN OR FORBEARANCE ESSENTIAL

Usury must be founded on a loan or forbearance of money. If neither of these elements exists, there can be no usury, however unconscionable the contract may be.<sup>40</sup> Thus, a change of securities for an existing debt, and payment of a sum of money to the creditor for his consent to the change, is not a loan, and, if there is no forbearance, there is no usury.<sup>41</sup>

<sup>37</sup> *Rosenstein v. Fox*, 150 N. Y. 354, 363, 44 N. E. 1027; *Cobb v. Hartenstein*, 47 Utah, 174, 152 Pac. 424.

<sup>38</sup> *Brown v. Cass County Bank*, 86 Iowa, 527, 53 N. W. 410, 412; *Rushing v. Willingham*, 105 Ga. 166, 31 S. E. 154; *Dodds v. McCormick Harvesting Mach. Co.*, 62 Neb. 759, 87 N. W. 911.

<sup>39</sup> *Jarvis v. Southern Grocery Co.*, 63 Ark. 225, 229, 38 S. W. 148.

<sup>40</sup> *Meaker v. Fiero*, 145 N. Y. 165, 39 N. E. 714; *Ellenbogen v. Griffey*, 55 Ark. 268, 18 S. W. 126.

<sup>41</sup> *Meaker v. Fiero*, 145 N. Y. 165, 171, 39 N. E. 714.

### 13. FORM OF CONTRACT IMMATERIAL

In determining whether a contract is usurious, the law looks not at the mere form, but at the substance. If there be in fact a usurious loan, no shift or device will protect it.<sup>42</sup>

Thus, if one mortgage his real estate, and at the same time agree that, in addition to the legal rate of interest, the mortgagee shall have the manure from the place, there is usury.<sup>43</sup> So, if an applicant for a loan from an insurance company is required, as a condition of procuring it, to take out a policy.<sup>44</sup>

A sale of stock, coupled with an agreement by the seller to buy it back at the price paid for it, with 1 per cent. a month added, if the purchaser should wish to sell, may be usurious, but the mere agreement does not in itself, as matter of law, stamp the transaction as a scheme or device to cover up a usurious loan.<sup>45</sup>

A seller of land or chattels may stipulate for a larger price on a credit sale than he would be willing to accept in cash, and the transaction is not rendered usurious by the fact that the credit price is in excess of the cash price and legal interest to the date of payment.<sup>46</sup> But when the sale is in fact at an agreed cash price, and the form of a sale on credit is resorted to for the purpose of evading the statute against usury, the transaction will be declared usurious.<sup>47</sup>

So, antedating a note for a loan is usurious, if with corrupt intent, but not otherwise.<sup>48</sup>

<sup>42</sup> *Scott v. Lloyd*, 9 Pet. 446, 9 L. Ed. 178; *Phelps v. Bellows' Estate*, 53 Vt. 539; *Meaker v. Fiero*, 145 N. Y. 165, 169, 39 N. E. 714; *Krumsieg v. Missouri, K. & T. Trust Co. (C. C.)* 71 Fed. 350, 352; *Brower v. Life Ins. Co. of Virginia (C. C.)* 86 Fed. 748; *Braine v. Rosswog*, 13 App. Div. 249, 42 N. Y. Supp. 1098; *Id.*, 153 N. Y. 647, 47 N. E. 1105; *Grannis v. Stevens*, 216 N. Y. 583, 111 N. E. 263; *Cobb v. Hartenstein*, 47 Utah, 174, 152 Pac. 424; *Houghton v. Burden*, 228 U. S. 161, 33 Sup. Ct. 491, 57 L. Ed. 780; *Knoup v. Carver*, 74 N. J. Eq. 449, 70 Atl. 660.

<sup>43</sup> *Vilas v. McBride*, 62 Hun, 324, 17 N. Y. Supp. 171, affirmed in 136 N. Y. 634, 32 N. E. 1014.

<sup>44</sup> *Carter v. Life Ins. Co. of Virginia*, 122 N. C. 338, 30 S. E. 341; *Union Cent. Life Ins. Co. v. Morrow*, 7 Ohio Dec. 118; *Hilliard v. Sanford*, 6 Ohio Dec. 449.

<sup>45</sup> *Phillips v. Mason*, 66 Hun, 580, 21 N. Y. Supp. 842.

<sup>46</sup> *Bass v. Patterson*, 68 Miss. 310, 313, 8 South. 849, 24 Am. St. Rep. 279; *Hogg v. Ruffner*, 1 Black, 115, 17 L. Ed. 38; *Brooks v. Avery*, 4 N. Y. 225; *Rushing v. Worsham*, 102 Ga. 825, 30 S. E. 541; *Beete v. Bidgood*, 7 Barn. & C. 453; *Floyer v. Edwards*, 1 Cowp. 112.

<sup>47</sup> *Bass v. Patterson*, 68 Miss. 310, 313, 8 South. 849, 24 Am. St. Rep. 279; *Quackenbos v. Sayer*, 62 N. Y. 344; *Thompson v. Nesbit*, 2 Rich. (S. C.) 73; *Torrey v. Grant*, 10 Smedes & M. (Miss.) 89.

<sup>48</sup> *Ansley v. Bank of Piedmont*, 113 Ala. 467, 479, 21 South. 59, 59 Am. St. Rep. 122.

## 14. HISTORICAL

The taking of any interest whatever was, by the ancient common law, absolutely prohibited.<sup>49</sup> The statute 37 Hen. VIII, c. 9, limited the rate to 10 per cent., and thus negatively authorized interest. The statute 12 Anne, St. 2, c. 16, reduced the authorized rate to 5 per cent., and provided that all bonds, contracts, and assurances whatsoever for payment of any principal, or money to be lent, or covenanted to be performed upon or for any usury, whereupon or whereby there should be reserved or taken above the rate of five pounds in the hundred, should be utterly void, and that any person who should take more than that rate should forfeit and lose for every such offense the treble value of the moneys, wares, merchandises, and other things so lent. Various English statutes establishing different rates had been passed between the dates of these two statutes.<sup>50</sup> By 17 & 18 Vict. c. 90, all the laws against usury were repealed, leaving parties at liberty to contract for any rate of interest. In the United States the statutes of usury have been based on the statute of Anne, but contain many variations from its provisions, differing among themselves in the rates of interest authorized and in other respects.

## 15. THE FEDERAL STATUTE

By the National Currency Act of June 3, 1864,<sup>51</sup> it is provided that national banks may loan money at the rate in force, in the states where they are respectively organized, in respect to state banks, and that this interest may be taken in advance. The knowingly taking, receiving, reserving, or charging a greater rate of interest effects a forfeiture of the entire interest, but does not prevent a recovery of the principal. If a greater rate of interest has actually been paid, the person paying it, or his legal representatives, may recover back twice the amount of interest thus paid, by an action to be brought within two years from the consummation of the transaction.

This statute thus embodies two provisions: First, that in case of an action by the bank upon a usurious agreement, only the principal of the loan may be recovered, and the defendant may set up the defense of usury to defeat a recovery of any interest; and, secondly, that in such an action, where interest in excess of the legal rate has al-

<sup>49</sup> Hawk, P. C. bk. 1. c. 82; Suth. Dam. § 301.

<sup>50</sup> See 2 Pars. Notes & B. 391; English Money Lenders Act, 63 & 64 Vict. c. 51.

<sup>51</sup> Act June 3, 1864, c. 106, 13 Stat. 99; Rev. St. U. S. § 5197 (Comp. St. 1916, § 9758).

ready been paid, the defendant cannot, by way of counterclaim or offset, recover under the clause entitling him to double the amount thus paid, but must enforce that right by a separate action against the bank.<sup>52</sup> And this federal statute applies to actions by or against national banks, even though brought in a state court.<sup>53</sup>

The general scheme of the federal statute is found embodied in some state statutes, and will be further discussed in the following sections.

## 16. NEW YORK STATUTES

In New York there are two principal statutes (with some minor ones) relating to usury. The first deals with the general subject, and the second deals with loans by state banks and "individual bankers."

(a) Under the statute first mentioned, the rate of interest upon the loan or forbearance of any money, goods, or things in action is 6 per cent., and the statute prohibits every person or corporation from directly or indirectly taking or receiving in money, goods, or things in action, or otherwise, any greater rate of interest. If any higher rate is paid, the person paying it may recover the excess by action, and all bonds, bills, notes, assurances, conveyances, and all other contracts or securities (except bottomry and respondentia bonds and contracts), and all deposits of goods or other things, whereupon or whereby there shall be reserved or taken, or secured or agreed to be reserved or taken, any greater sum, or greater value, for a loan or forbearance, than is prescribed by the statute, are void.<sup>54</sup> It will thus be noticed that under this statute usury invalidates the contract for repayment, and no action will lie by the lender to recover even the principal; while the borrower, if he has paid excessive interest, may recover such excess.

(b) Another statute (Laws 1892, c. 689, § 55)<sup>55</sup> follows in practically identical language the federal statute relating to national banks, but applies its provisions to state banks, trust companies, private bankers, and individual bankers, fixes the legal rate at 6 per cent., and adds:

<sup>52</sup> *Barnet v. Muncie Nat. Bank*, 98 U. S. 555, 25 L. Ed. 212; *First Nat. Bank v. Watt*, 184 U. S. 151, 22 Sup. Ct. 457, 46 L. Ed. 475; *Schuyler Nat. Bank v. Gadsden*, 191 U. S. 451, 24 Sup. Ct. 129, 48 L. Ed. 258.

<sup>53</sup> *National Bank of Auburn v. Lewis*, 81 N. Y. 15; *Marion Nat. Bank v. Thompson*, 101 Ky. 277, 40 S. W. 903; *First Nat. Bank v. Childs*, 133 Mass. 248, 251, 43 Am. Rep. 509; *First Nat. Bank of Clarion v. Gruber*, 91 Pa. 377. As to the meaning of "twice the amount of interest paid," which may be recovered, see *Hill v. National Bank (C. C.)* 15 Fed. 432; *Hintermister v. First Nat. Bank of Chittenango*, 64 N. Y. 212; *Carnegie Trust Co. v. Chapman*, 153 App. Div. 783, 138 N. Y. Supp. 715.

<sup>54</sup> 2 Rev. St. (9th Ed.) pp. 1854-1857, now Consol. Laws, c. 20, §§ 370-382.

<sup>55</sup> Now Banking Law (Consol. Laws, c. 2, as re-enacted by Laws 1914, c. 369) §§ 2, 114, 115, 200, 201.

"The true intent and meaning of this section is to place and continue banks and individual bankers on an equality in the particulars herein referred to with the national banks organized under the act of congress."<sup>56</sup>

The result of these provisions is that under this statute the construction given to the federal act restricting the right of the borrower who has actually paid excessive interest to recover twice the amount thereof to a direct action, applies also to the state statute, so that such a claim cannot be set up by way of counterclaim or offset in an action by the lender to recover the principal.<sup>57</sup>

The New York law, prior to the revision of 1892, above cited, and since the amendment of 1900 (chapter 310), refers in terms not only to banks and "individual bankers," but also to "private bankers." The term "individual banker" denotes a person who, having complied with the statutory requirements, has received authority from the banking department to engage in the business of banking, subject to its inspection and supervision. "Private bankers" are persons or firms engaged in banking without having any special privileges or authority from the state. The statute protects not only banking corporations, and individual bankers, but also private bankers, from the consequences imposed by the general statutes on citizens not engaged in banking who receive more than the legal rate of interest.<sup>58</sup>

## 17. STATUTES OF OTHER STATES

As already stated, the statutes of usury in the several states, while similar in many respects, differ in some particulars among themselves. Thus, in New York, if interest is paid at a usurious rate, the excess may be recovered back by an action;<sup>59</sup> while in Nebraska and other states the borrower cannot recover any part of the interest paid, but is confined to the defense of usury in an action against him on the contract.<sup>60</sup>

Under such statutes the payment of the usurious interest, together with the whole of the principal, constitutes a settlement; while, if the

<sup>56</sup> Act June 3, 1864, c. 106, 13 Stat. 99.

<sup>57</sup> *Caponigri v. Altieri*, 29 App. Div. 304, 51 N. Y. Supp. 418.

<sup>58</sup> *Perkins v. Smith*, 116 N. Y. 441, 449, 23 N. E. 21; *Carley v. Tod*, 83 Hun, 53, 73. 31 N. Y. Supp. 635. But as to the effect of Laws 1892, c. 689, above summarized, which omitted the term "private banker," see *Hawley v. Kountze*, 16 Misc. Rep. 249, 250, 38 N. Y. Supp. 327 (reversed, but not on this point, in 6 App. Div. 217, 39 N. Y. Supp. 897).

<sup>59</sup> 2 Rev. St. (9th Ed.) p. 1854, now General Business Law (Consol. Laws, c. 20) § 372.

<sup>60</sup> *Blain v. Willson*, 32 Neb. 302, 49 N. W. 224; *Latham v. Washington*



contract or note be only partially settled, then the defense of usury can still be made.<sup>61</sup> And by Rev. St. U. S. § 5198 (Comp. St. 1916, § 9759), if usurious interest has been paid to a national bank, twice that amount may be recovered by action.<sup>62</sup>

As a general rule, however, usurious interest can be recovered back, since it was illegally exacted and the borrower was not in equal fault.<sup>63</sup>

So, by the general New York statute, usury renders void the contracts or securities reserving or securing it, while in other states the contract is not avoided, but in an action thereon the plaintiff may still recover the principal without any interest, diminished by any interest that shall have been already paid.<sup>64</sup> And under the federal statute,<sup>65</sup> and also the New York statute relating to banks and individual bankers, usury forfeits the interest, but the principal may be recovered without offset, the borrower being left to his action for debt to recover twice the interest paid.<sup>66</sup>

In still other states the parties may agree in any contract in writing for the payment of any rate of interest, and it must then be allowed, both at law and in equity, and there can be no relief on the mere ground of excessive interest in the absence of fraud or imposition.<sup>67</sup> Further variations also exist in different jurisdictions, under the terms of local statutes.<sup>68</sup>

## 18. EXCEPTIONS

### *Demand Loans*

In New York, where advances of money, repayable on demand, to an amount not less than \$5,000, are made upon warehouse receipts, bills of lading, certificates of stock, certificates of deposit, bills of exchange, bonds or other negotiable instruments pledged as collateral security for such repayment, it is lawful to receive, or contract to re-

Building & Loan Ass'n, 77 N. C. 145; Hadden v. Innes, 24 Ill. 381; Quinn v. Boynton, 40 Iowa, 304; Spurlin v. Millikin, 16 La. Ann. 217.

<sup>61</sup> New England Mortg. Sec. Co. v. Aughe, 12 Neb. 504, 11 N. W. 753; Hadden v. Innes, 24 Ill. 381.

<sup>62</sup> So, in actions in New York against state banks and individual bankers. Laws 1892, c. 689, § 55.

<sup>63</sup> Harbaugh v. Tanner, 163 Ind. 574, 71 N. E. 145; Hintze v. Taylor, 57 N. J. Law, 239, 30 Atl. 551; 39 Cyc. 1015. See, also, Thomas v. Burnce, 223 Mass. 311, 111 N. E. 871. See p. 345, post.

<sup>64</sup> Blain v. Willson, 32 Neb. 302, 49 N. W. 224.

<sup>65</sup> Rev. St. U. S. § 5198 (Comp. St. 1916, § 9759).

<sup>66</sup> Barnett v. Muncie Nat. Bank, 98 U. S. 555, 558, 25 L. Ed. 212.

<sup>67</sup> Boyce v. Fisk, 110 Cal. 107, 42 Pac. 473; Pub. St. Mass. 1882, p. 426; Cate v. Merrill, 109 Me. 424, 84 Atl. 897; Thomas v. Burnce, 223 Mass. 311, 111 N. E. 871.

<sup>68</sup> See, also, in general, 4 Comp. St. N. J. 1910, pp. 5704-5706; Brightly, Purd. Dig. Pa. (12th Ed.) pp. 1062-1064; Pub. St. Mass. 1882, p. 426; 1 Supp.

ceive, and collect, as compensation, any sum, to be agreed upon in writing by the parties to such transaction.<sup>69</sup> And where one borrows a sum not less than \$5,000 upon his note, secured by shares of stock, the fact that he gives to the lender, at the same time, an agreement to sell him such stock at the latter's option, at a specified price, even though the price fixed is less than its actual value, does not take the case out of the protection of the statute relating to call loans upon security. The effect of the statute is to remove such loans from the operation of the usury laws, and it seems that the only importance of an agreement in writing as to the sum to be received by the lender is to enable the latter to collect more than 6 per cent. as his compensation.<sup>70</sup>

### *Loans to Corporations*

It is also provided by statute in New York that no corporation shall interpose the defense of usury. The term "corporation," as used in the New York statute, includes all associations and joint-stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships.<sup>71</sup>

The result of this statute is that "the condition of this class of beings becomes the same as if the usury laws never existed," so far as concerns contracts governed by the laws of New York, but the act has no application to contracts controlled by the laws of another state or country.<sup>72</sup>

### *Loans by Pawnbrokers*

Pawnbrokers are generally required by statute to procure licenses, and the interest they may charge is usually fixed by law at a rate in excess of that allowed in other cases. In New York<sup>73</sup> the rate is fixed at 3 per cent. per month for the first six months, and 2 per cent. per month thereafter, on loans not exceeding \$100, and at a lower rate for larger loans.

Pub. St. Mass. p. 757; 2 Supp. Pub. St. Mass. p. 661; Rev. Laws, c. 73, § 3; Thomas v. Burnce, *supra*.

<sup>69</sup> Banking Law (Consol. Laws, c. 2, as re-enacted by Laws 1914, c. 369) §§ 115, 201; General Business Law (Consol. Laws, c. 20) § 379; Wright v. Toomey, 137 App. Div. 401, 121 N. Y. Supp. 721, affirmed 204 N. Y. 661, 97 N. E. 1118.

<sup>70</sup> Hawley v. Kountze, 6 App. Div. 217, 39 N. Y. Supp. 897.

<sup>71</sup> 2 Rev. St. (9th Ed.) p. 1855; General Business Law (Consol. Laws, c. 20) § 374; De Moltke-Huitfeldt v. Garner & Co., 145 App. Div. 766, 130 N. Y. Supp. 558; Mazarin v. Hudson County Real Estate & Building Co., 80 N. J. Law, 35, 76 Atl. 322.

<sup>72</sup> Curtis v. Leavitt, 15 N. Y. 9, 85.

<sup>73</sup> General Business Law (Consol. Laws, c. 20) §§ 46, 52.

*Loans by Personal Loan Companies*

In addition to loans by pawnbrokers, the New York statutes provide for and regulate similar loans by duly licensed personal loan companies, associations and brokers, in amounts not to exceed \$200, either upon pawnbrokers' security or upon mortgages, indorsed or guaranteed notes and assignments of wages, at rates of 2 and 3 per cent. a month.<sup>74</sup> If the rates so authorized are exceeded, the transaction is void.<sup>75</sup>

## 19. COMPENSATION FOR SERVICES

Whether the payment of a sum described as commissions, in addition to the legal rate of interest, renders a loan usurious, depends on the question of fact whether or not the person to whom it is paid is in reality the agent of the borrower to procure the loan, and is thus paid for his services in procuring it. If so, this is no ground for charging the lender with usury.<sup>76</sup>

But if the alleged agent of the borrower really received the so-called commission as an additional payment for the loan, on behalf of the lender, the transaction is usurious.<sup>77</sup>

The mere fact that the person to whom a commission is paid, and by whom it is exacted, is in fact also an agent of the lender in reference to effecting the loan, does not, in itself, result in usury. To have that effect, it must be shown that he took it with the knowledge and assent of the lender, so that the latter, at least by acquiescence, became a party to the usurious exaction. It is not even sufficient to show that the lender knew of the usurious exaction after he had made the loan and the transaction was completed. He must have known of it at the time. Nor is it sufficient to show that he supposed that his agent was to receive some compensation for services which he rendered to the borrower.<sup>78</sup>

<sup>74</sup> Banking Law (Consol. Laws, c. 20) §§ 343-345, as re-enacted and amended by Laws 1915, c. 588.

<sup>75</sup> Lowry v. Collateral Loan Ass'n, 172 N. Y. 394, 65 N. E. 206; London Realty Co. v. Riordan, 207 N. Y. 264, 100 N. E. 800, Ann. Cas. 1914C, 408.

<sup>76</sup> Telford v. Garrels, 132 Ill. 550, 554, 24 N. E. 573; Moore v. Bogart, 19 Hun (N. Y.) 227; Goodwin v. Bishop, 145 Ill. 421, 34 N. E. 47; Ginn v. New England Mortg. Security Co., 92 Ala. 135, 138, 8 South. 388; Conover v. Van Mater, 18 N. J. Eq. 481; Grant v. Phoenix Mut. Life Ins. Co., 121 U. S. 105, 7 Sup. Ct. 841, 30 L. Ed. 905; Smith v. Wolf, 55 Iowa, 555, 8 N. W. 429.

<sup>77</sup> Braine v. Rosswog, 13 App. Div. 249, 42 N. Y. Supp. 1098; Id., 153 N. Y. 647, 47 N. E. 1105; Hare v. Hooper, 56 Neb. 480, 76 N. W. 1055; Hughson v. Newark Mortg. Loan Co., 57 N. J. 139, 41 Atl. 492.

<sup>78</sup> Stillman v. Northrup, 109 N. Y. 473, 17 N. E. 379; Call v. Palmer, 116 U. S. 98, 6 Sup. Ct. 301, 29 L. Ed. 559; Muir v. Newark Sav. Ins., 16 N. J. Eq. 537;

But where an agent authorized to lend, though not to take usury, lends the money of his principal at a usurious rate, and both the sum lent and the usury exacted are secured by the same instrument, which the principal, knowing that it is for a larger amount than the sum loaned, without explanation, accepts, and has the benefit, he adopts the act of his agent the same as if it had been done by himself.<sup>79</sup>

As the borrower may pay a third party for services in connection with procuring the loan, without rendering the loan itself usurious, so he may pay to the lender, out of the money borrowed, or the lender may, by his direction, retain, a sum in excess of interest, if it is in reality a bona fide payment for services rendered to the borrower by the lender in other connections, and is not a cloak for usury.<sup>80</sup>

So a payment by a borrower to the lender's agent, under the lender's requirement, of the expenses of examining the title of the property mortgaged as security and of preparing the necessary papers, or a clause providing for payment of attorney's fees in foreclosure, if necessary, has been held unobjectionable.<sup>81</sup> And the borrower may even validly agree to pay the lender, in addition to legal interest, for the latter's services and disbursements in collecting in other loans from others, in order to lend to him, and for that purpose going to another town, borrowing funds to make up the required loan, etc. For such payment is not, if bona fide, for the loan, but for work, labor, services, and expenses.<sup>82</sup>

## 20. SALES OF PROPERTY OR CREDIT

Usury laws apply only to a loan or forbearance of money and not to a sale. The purchase, for example, of an existing security for money at a discount, is a common and legitimate transaction, and the purchaser may enforce it for its full amount. Such a transaction may,

*Chicago Fire-Proofing Co. v. Park Nat. Bank*, 145 Ill. 481, 32 N. E. 534; *Harvard v. Davis*, 145 Ga. 580, 89 S. E. 740; *Griswold v. Dugane*, 148 Iowa, 504, 127 N. W. 664.

<sup>79</sup> *Bliven v. Lydecker*, 130 N. Y. 107, 28 N. E. 625; *McNeely v. Ford*, 103 Iowa, 508, 72 N. W. 672, 64 Am. St. Rep. 195.

<sup>80</sup> *Swanstrom v. Balstad*, 51 Minn. 276, 53 N. W. 648; *Houghton v. Burden*, 228 U. S. 161, 33 Sup. Ct. 491, 57 L. Ed. 780; *London Realty Co. v. Riordan*, 207 N. Y. 264, 100 N. E. 800, Ann. Cas. 1914C, 408.

<sup>81</sup> *Ammondson v. Ryan*, 111 Ill. 506; *Ginn v. New England Mortg. Security Co.*, 92 Ala. 135, 138, 8 South. 388; *Glover v. Equitable Mortg. Co.*, 31 C. C. A. 105, 87 Fed. 518. See *Ellenbogen v. Griffey*, 55 Ark. 268, 272, 18 S. W. 126.

<sup>82</sup> *Thurston v. Cornell*, 38 N. Y. 281; *Harger v. McCullough*, 2 Denio (N. Y.) 119; *Eaton v. Alger*, \*41 N. Y. 41; *Palmer v. Baker*, 1 Maule & S. 56.

of course, however, be a cloak for a usurious loan, and in that case it will not avail.<sup>83</sup>

Thus, many statutes relating to usury, as, for example, Rev. St. U. S. § 5197 (Comp. St. 1916, § 9758), and Laws N. Y. 1892, c. 689, § 55, provide, in substance, that the purchase, discount, or sale of a bona fide bill of exchange, note, or other evidence of debt payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts, or a reasonable charge for the collection of the same in addition to the interest, shall not be considered as taking or receiving a greater rate of interest than 6 per cent.

But, to come within the field of a sale, there must be an existing valid security to be sold. Thus, where one makes a note, and gives it to a note broker for sale at a rate not exceeding 6 per cent. per annum, and he sells it at a discount of 10 per cent., the real nature of the transaction is a loan by the so-called purchaser to the maker through the broker, and accordingly the loan is usurious, and the note void.<sup>84</sup>

This rule, which renders void a note in the hands of a third party who has purchased it at a discount greater than the legal interest, finds its application in the case of instruments that have no legal inception between the parties, or which are not intended to be available until discounted.<sup>85</sup> So, a sale of a legacy, if bona fide, and not a cloak for usury, is valid, though the price paid is less than the face of the legacy.<sup>86</sup> So, a sale of one's credit can never be void for usury, at whatever price it may be made, unless it can be seen that it is intended as a cover for a usurious loan of money.<sup>87</sup> Any person is at liberty to sell his credit at whatever price he can get for it, precisely as he is at liberty to sell any other property which he may have,<sup>88</sup> except where it is specifically prohibited by statute under given circumstances.<sup>89</sup>

<sup>83</sup> *Siewert v. Hamel*, 91 N. Y. 199, 202; *Standen v. Brown*, 152 N. Y. 128, 46 N. E. 167; *Ellenbogen v. Griffey*, 55 Ark. 268, 18 S. W. 126; *Struthers v. Drexel*, 122 U. S. 487, 7 Sup. Ct. 1293, 30 L. Ed. 1216.

<sup>84</sup> *Claffin v. Boorum*, 122 N. Y. 385, 25 N. E. 360; *Freeport Bank v. Hagemeyer*, 91 Hun, 194, 36 N. Y. Supp. 214. See *Norton, Bills & Notes* (4th Ed.) p. 315, where this rule is criticized on the ground that there is no corrupt intent and that accommodation has its inception between the accommodation parties, citing authorities contra.

<sup>85</sup> *Joy v. Diefendorf*, 130 N. Y. 6, 10, 28 N. E. 602, 27 Am. St. Rep. 484. See *National Revere Bank v. Morse*, 163 Mass. 383, 385, 40 N. E. 180.

<sup>86</sup> *Hintze v. Taylor*, 57 N. J. Law, 239, 30 Atl. 551.

<sup>87</sup> *Forgotston v. McKeon*, 14 App. Div. 342, 344, 43 N. Y. Supp. 939; *Elwell v. Chamberlin*, 31 N. Y. 611, 617; *More v. Howland*, 4 Denio (N. Y.) 264.

<sup>88</sup> *Forgotston v. McKeon*, 14 App. Div. 342, 344, 43 N. Y. Supp. 939.

<sup>89</sup> Penal Laws (Consol. Laws, c. 40) § 2400.

## 21. INTEREST IN ADVANCE

If, upon the making of a loan, interest at the legal rate is paid in advance, the necessary result is, of course, to give the lender more than legal interest, for he thus has, in addition, the use of that interest before his loan has earned it. This is a matter which has been variously treated in different jurisdictions. Thus, in Illinois, it is not usurious to exact the payment of interest in advance.<sup>90</sup> Thus, by the federal law relating to national banks, and the New York law relating to state banks and individual bankers, it is provided that interest at the legal rate may be taken in advance, reckoning the days for which the note, bill, or evidence of debt has to run. "Upon the discounting of commercial paper not having a longer time to run to maturity than the notes and bills which are usually discounted by bankers, interest on the whole amount of principal agreed to be paid at maturity, not exceeding the legal rate, may be taken in advance."<sup>91</sup> But, in order to render this principle applicable, the paper discounted must be a negotiable instrument, and payable at no very distant day.<sup>92</sup> So, interest may be validly made payable monthly, quarterly, or semiannually on paper having a longer time to run.<sup>93</sup>

## 22. BOTTOMRY AND RESPONDENTIA

The fundamental element of usury consisting in the corrupt reservation or exaction of a payment, for a loan or forbearance, in addition to a repayment of the principal, in excess of the legal rate of interest, it is obvious that there must be cases where, the repayment of both principal and interest being contingent, the reservation of a reasonable payment in excess of the legal rate to cover that risk would

<sup>90</sup> *Telford v. Garrels*, 132 Ill. 550, 554, 24 N. E. 573.

<sup>91</sup> *Marvine v. Hymers*, 12 N. Y. 223, 227; *Manhattan Co. v. Osgood*, 15 Johns. (N. Y.) 162; *New York Firemen Ins. Co. v. Sturges*, 2 Cow. (N. Y.) 664; *Bank of Utica v. Wager*, Id. 712; Id., 8 Cow. (N. Y.) 398; *Bank of Utica v. Phillips*, 3 Wend. (N. Y.) 408; *Utica Ins. Co. v. Bloodgood*, 4 Wend. (N. Y.) 652; *Thornton v. Bank of Washington*, 3 Pet. 36, 7 L. Ed. 594; *International Bank v. Bradley*, 19 N. Y. 245, 254; *Lloyd v. Williams*, 2 W. Bl. 792; *Crowell v. Jones*, 167 N. C. 386, 83 S. E. 551.

Interest more than a year in advance is usury. *Allen v. Dunn*, 71 Neb. 831, 99 N. W. 680.

<sup>92</sup> *Marvine v. Hymers*, 12 N. Y. 223, 229; *Marsh v. Martindale*, 3 Bos. & P. 158.

<sup>93</sup> *Mowry v. Bishop*, 5 Paige (N. Y.) 98, 101; *Peirce v. Rowe*, 1 N. H. 179; *Greenleaf v. Kellogg*, 2 Mass. 568; *Gladwyn v. Hitchman*, 2 Vern. 135; *Sessions v. Richmond*, 1 R. I. 305; *Allen v. Dunn*, *supra*.

not fall within the purpose of the prohibition. Such instances are found in the case of loans upon bottomry or respondentia, where money is loaned, respectively, on a ship or its cargo, and it is agreed that, if the property thus pledged to secure the loan should be lost, the borrower shall repay nothing to the lender.<sup>94</sup>

The same principle applies to the case of a purchase of an annuity involving similar uncertainty, and to the so-called post obit contracts.<sup>95</sup>

### 23. USURY AND PENALTY DISTINGUISHED

As already noticed, statutes of usury frequently contain two distinct provisions, namely, that the agreement for a usurious rate of payment for a loan or forbearance shall result in a forfeiture of either principal or interest or both, and that, in addition, a borrower who has in fact paid interest in excess of the legal rate may recover back by action not merely what he has paid, but an additional sum, by way of penalty. This represents one use of the term "penalty."<sup>96</sup>

A second sense in which the term is employed is found in cases where one agrees that, in case of breach by him of his agreement to pay the principal when due, he will pay an extra sum as a penalty for the breach. This is unobjectionable, for, if the payment of the extra sum is purely conditional, and that condition it is within the power of the debtor to perform, so that the creditor may, by the debtor's act, be deprived of any extra payment, it is not usurious;<sup>97</sup> and, being a penalty, it is of no effect.<sup>98</sup>

<sup>94</sup> *Thorndike v. Stone*, 11 Pick. (Mass.) 183; *Bray v. Bates*, 9 Metc. (Mass.) 237, 250; 1 Pars. Mar. Ins. 208.

<sup>95</sup> 3 Pars. Cont. 140; *Lloyd v. Scott*, 4 Pet. 205, 7 L. Ed. 833; *Scott v. Lloyd*, 9 Pet. 418, 9 L. Ed. 178; *Delano v. Wild*, 6 Allen (Mass.) 1, 8, 83 Am. Dec. 605; *Earl of Chesterfield v. Janssen*, 1 Atk. 301, 2 Ves. Sr. 125; *Batty v. Lloyd*, 1 Vern. 141.

<sup>96</sup> *Osborn v. First Nat. Bank of Athens*, 154 Pa. 134, 26 Atl. 289.

<sup>97</sup> *Sumner v. People*, 29 N. Y. 337; *Pomeroy v. Ainsworth*, 22 Barb. (N. Y.) 124; *Green v. Brown*, 22 Misc. Rep. 279, 49 N. Y. Supp. 163; *Floger v. Edwards*, Cowp. 112, 115; *Garret v. Foot*, Comb. 133; *Roberts v. Trenayne*, Cro. Jac. 507; *Burton's Case*, 5 Coke, 69a; *Cutler v. How*, 8 Mass. 259. But, if it is a mere cover for usury, it will not avail. *Sumner v. People*, 29 N. Y. 337, 342.

<sup>98</sup> See *Sutherland, Dam.* (4th Ed.) § 318, where the rule is explained and criticized. See *Damages*, p. 493, post.

## 24. NEGOTIABLE INSTRUMENTS—BONA FIDE HOLDER

In some states, where usury renders void the instrument affected thereby, it is held that: "A note void in its inception for usury continues void forever, whatever its subsequent history may be. It is as void in the hands of an innocent holder for value as it was in the hands of those who made the usurious contract. No vitality can be given it by sale or exchange, because that which the statute has declared void cannot be made valid by passing through the channels of trade."<sup>99</sup> While in other states, where a usurious note is not void, but void or voidable as to the usury only, at the instance of the debtor, it is held that, if a purchaser of a note knows nothing of the usury between the original parties, he will not be affected thereby.<sup>1</sup> While in still others, where the statute renders the note void as to interest while valid as to principal, the innocent purchaser for value, before maturity, may enforce it as to principal, but not as to interest, for it gathers no validity by circulation.<sup>2</sup> After a lender has parted with the note given for the loan to a bona fide holder, the latter cannot be prejudiced by any subsequent acts of the original parties.<sup>3</sup>

## 25. CONTINGENT BENEFITS AS USURY

When a lender stipulates for a contingent benefit beyond the legal rate of interest, and has the right to demand the repayment of the principal sum, with the legal interest thereon, in any event, the contract is in violation of the statute for prohibiting usury; as, for example, where, in addition to stipulating for legal interest in any event, a borrower agreed that the lender should have a contingent interest in the profits of a certain business.<sup>4</sup>

<sup>99</sup> *Claffin v. Boorum*, 122 N. Y. 385, 25 N. E. 360; *Union Bank of Rochester v. Gilbert*, 83 Hun, 417, 420, 31 N. Y. Supp. 945.

As to whether the Negotiable Instruments Law changes this rule, see *Norton, B. & N.* (4th Ed.) p. 304 note; *Sabine v. Paine*, 166 App. Div. 9, 151<sup>st</sup> N. Y. Supp. 735.

<sup>1</sup> *Bradshaw v. Van Valkenburg*, 97 Tenn. 316, 320, 37 S. W. 88.

<sup>2</sup> *Miles v. Kelley*, 16 Tex. Civ. App. 147, 40 S. W. 599, 601; *Andrews v. Hoxie*, 5 Tex. 172; *Ward v. Sugg*, 113 N. C. 489, 18 S. E. 717, 24 L. R. A. 280.

<sup>3</sup> *Seymour Opera-House Co. v. Thurston*, 18 Tex. Civ. App. 417, 45 S. W. 815.

<sup>4</sup> *Browne v. Vredenburg*, 43 N. Y. 195; *Gilbert v. Warren*, 19 App. Div. 403, 46 N. Y. Supp. 489.



## 26. SUBSTITUTED SECURITIES

When a security tainted with usury is given up, and a new security substituted, in renewal or continuance, the new security is also tainted with usury.<sup>5</sup>

## 27. SUBSEQUENT USURIOUS AGREEMENT

If, when a loan is made, there is no agreement for usurious interest, the fact that subsequently it is agreed that a usurious rate shall be paid, and notes for the loan are given, which are invalidated by this illegal feature, the invalidity of the notes does not react upon the original loan, so as to invalidate it also. The only effect of avoiding the notes is to leave the original loan standing.<sup>6</sup> So the mere fact that excessive interest has been paid does not show that it was originally agreed on or exacted for the loan or forbearance.<sup>7</sup> And so a promissory note, not originally usurious, cannot be made so by an agreement for an extension, subsequently entered into, in consideration of a payment of, or a promise to pay, usurious interest.<sup>8</sup>

## 28. RECOVERING BACK USURIOUS PAYMENTS

The rule that, when a plaintiff is in *pari delicto* with the defendant, money paid by the former to the latter cannot be recovered back, applies only where the act done is in itself immoral, or a violation of the general laws of public policy, but does not bar a recovery where the law violated is intended for the protection of the citizen against oppression, extortion, or deceit. Within the latter class falls the case of usurious payments.<sup>9</sup>

<sup>5</sup> *Treadwell v. Archer*, 76 N. Y. 196; *Walker v. Bank of Washington*, 3 How. 67, 71, 11 L. Ed. 494; *Feldman v. McGraw*, 1 App. Div. 574, 37 N. Y. Supp. 434; *Id.*, 14 App. Div. 631, 43 N. Y. Supp. 885; *Sheldon v. Haxtun*, 91 N. Y. 124, 131; *Marion Nat. Bank v. Thompson*, 101 Ky. 277, 40 S. W. 903-905; *Brown v. Marion Nat. Bank*, 169 U. S. 416, 18 Sup. Ct. 390, 42 L. Ed. 801; *Bank of Russellville v. Coke (Ky.)* 45 S. W. 867; *Farmers' Bank of Kearney v. Oliver*, 55 Neb. 774, 76 N. W. 449; *Pardoe v. Iowa State Bank*, 106 Iowa, 345, 76 N. W. 800. See *First Nat. Bank of Garden City v. Segal*, 21 Pa. Co. Ct. R. 113; *McFarland v. State Bank of Chase*, 7 Kan. App. 722, 52 Pac. 110.

<sup>6</sup> *In re Consalus*, 95 N. Y. 340, 344; *Humphrey v. McCauley*, 55 Ark. 143, 146, 17 S. W. 713; *Nichols v. Fearson*, 7 Pet. 104, 8 L. Ed. 623.

<sup>7</sup> *Willard v. Pinard*, 65 Vt. 160, 166, 26 Atl. 67.

<sup>8</sup> *Morse v. Wellcome*, 68 Minn. 210, 70 N. W. 978, 64 Am. St. Rep. 471; *Ganz v. Lancaster*, 169 N. Y. 357, 62 N. E. 413, 58 L. R. A. 151.

<sup>9</sup> *Hintze v. Taylor*, 57 N. J. Law, 239, 241, 30 Atl. 551; *Jones v. Bark-*

This principle is subject, of course, to that elsewhere discussed, and adopted under the statutes of some states—that, if all the principal and usurious interest have been paid, no action will lie to recover back the interest.

Statutes authorizing actions to recover back usurious interest that has been paid provide that they must be brought within some specified time “from the time when the usurious transaction occurred.” Under such a clause, the “usurious transaction” occurs only when a greater amount than the principal, with legal interest, has been paid, or judgment has been taken for such greater amount. In other words, the time of the limitation does not begin to run until the creditor has received, in the way of payment of principal and usurious interest, a sum in excess of the principal and legal interest, or has taken judgment for such excessive sum. The theory is that the creditor, when entitled in any event to his principal, and only liable to a forfeiture of interest, or to a recovery thereof by the borrower, or of some larger sum by way of penalty, in case he has actually received an excess, has an election to repent him of his usurious exaction, which may be made or evidenced by crediting all payments received, whether intended at the time they are made to be of usury or not, on the principal or legal interest; and his failure to avail himself of this option, and his receipt of illegal interest, cannot, while he still has this *locus poenitentiae*, be affirmed; so that until the payment of an actual excess above principal and legal interest, or judgment therefor, the “usurious transaction” has not “occurred.”<sup>10</sup>

After the time limited by the statute, no further right of action exists.<sup>11</sup>

Statutes authorizing the borrower or his “personal representatives” to recover, for example, twice the excess over legal interest, do not allow such an action by his assignee.<sup>12</sup>

ley, Doug. 684; *Wheaton v. Hibbard*, 20 Johns. (N. Y.) 290, 11 Am. Dec. 284; *Thomas v. Shoemaker*, 6 Watts & S. (Pa.) 183. See p. 337, ante.

<sup>10</sup> *First Nat. Bank v. Denson*, 115 Ala. 650, 22 South. 518, 522; *Duncan v. First Nat. Bank*, Fed. Cas. No. 4,135; *McBroom v. Scottish Mortg. & Land Inv. Co.*, 153 U. S. 318, 328, 14 Sup. Ct. 852, 856, 38 L. Ed. 729; *Stevens v. Lincoln*, 7 Metc. (Mass.) 525; *Harvey v. National Life Ins. Co.*, 60 Vt. 209, 14 Atl. 7.

<sup>11</sup> *Palen v. Johnson*, 46 Barb. (N. Y.) 23, affirmed in 50 N. Y. 49; *Matthews v. Paine*, 47 Ark. 54, 14 S. W. 463. Compare *Wheaton v. Hibbard*, 20 Johns. (N. Y.) 290, 11 Am. Dec. 284; *Brown v. McIntosh*, 39 N. J. Law, 22; *Baum v. Thoms*, 150 Ind. 378, 50 N. E. 357, 65 Am. St. Rep. 368.

<sup>12</sup> *Pardoe v. Iowa State Bank*, 106 Iowa, 345, 76 N. W. 800; *Osborn v. First Nat. Bank*, 175 Pa. 494, 499, 34 Atl. 858.

Otherwise where there is no restrictive language. *Wheelock v. Lee*, 64 N. Y. 242.

## 29. CREDITING USURIOUS PAYMENTS

As long as any sum is due upon a lawful debt, out of or in connection with which a usurious contract has once arisen, all payments made on either should be credited on the valid claim.<sup>13</sup>

Where a debtor does in fact pay the lender sums in excess of legal interest, but only from motives of gratitude or generosity, and not in pursuance of an agreement or exaction for the loan or forbearance of money, he cannot recover such payments back, or have them credited as payments upon the principal.<sup>14</sup>

## 30. WHO MAY SET UP USURY

The right to set up the defense of usury is personal to the borrower, and, under some circumstances, those in privity with him; as, for example, his heirs, devisees, mortgagees subsequent to a usurious mortgage, purchasers, and trustees.<sup>15</sup>

It is not necessary to use the word "corrupt," nor even the word "usury," if the facts establishing those incidents of the transaction are set forth;<sup>16</sup> but merely applying epithets, or pleading a definition of usury, does not constitute that "plain statement of facts" necessary to a sufficient pleading.<sup>17</sup>

## 31. PLEADING USURY

Usury, as a defense, must be pleaded. It is like every other defense, and cannot be proved unless it is set up in the answer. If it is not pleaded, it will be considered as waived. And the rule is so strict with reference to pleading it that it has been held that it must be set forth "with such precision and certainty as to make out on the face of the pleading that a corrupt and usurious contract has been entered into."<sup>18</sup>

<sup>13</sup> *Humphrey v. McCauley*, 55 Ark. 143, 147, 17 S. W. 713; *Payne v. Newcomb*, 100 Ill. 611, 39 Am. Rep. 69; *Rogers v. Buckingham*, 33 Conn. 81; *Fretz v. Murray*, 118 Mich. 302, 76 N. W. 495; *Haskins v. Bank of State of Georgia*, 100 Ga. 216, 27 S. E. 985.

<sup>14</sup> *White v. Benjamin*, 138 N. Y. 623, 626, 33 N. E. 1037.

<sup>15</sup> *Berdan v. Sedgwick*, 44 N. Y. 626; *Williams v. Tilt*, 36 N. Y. 319, 325; *Post v. Dart*, 8 Paige (N. Y.) 639; *De Wolf v. Johnson*, 10 Wheat. 367, 393, 6 L. Ed. 343; *Green v. Kemp*, 13 Mass. 515, 7 Am. Dec. 169; 3 Pars. Cont. 122; *In re Elmore Cotton Mills* (D. C.) 217 Fed. 810.

<sup>16</sup> *Miller v. Schuyler*, 20 N. Y. 522.

<sup>17</sup> *Chapuis v. Mathot*, 91 Hun, 565, 568, 36 N. Y. Supp. 835.

<sup>18</sup> *Laux v. Gildersleeve*, 23 App. Div. 352, 355, 48 N. Y. Supp. 301; *Chapuis v. Mathot*, 91 Hun, 565, 36 N. Y. Supp. 835; *Stanley v. Chicago Trust & Savings Bank*, 165 Ill. 295, 46 N. E. 273; *Mosier v. Norton*, 83 Ill. 519. See

### 32. BURDEN OF PROOF

Where the defense of usury is interposed, the burden of showing that the special agreement for an illegal rate, which must exist in every case of usury, was in fact made, rests upon the defendant.<sup>19</sup> He enters upon the defense with the presumption against the violation of the law and in favor of the innocence of the party charged with the usury. It is a just requirement that all the facts constituting the usury should be proved with reasonable certainty, and that they should not be established by mere surmise and conjecture, or by inferences entirely uncertain.<sup>20</sup>

### 33. CRIMINAL PROSECUTION FOR USURY

Where a statute simply provides, as in New York (Pen. Law [Consol. Laws, c. 40] § 2400), that a person receiving usurious interest shall be guilty of a misdemeanor, the allegations of an indictment thereunder, in order to constitute a good plea, must not merely allege the unlawful exacting and receiving of a specified sum in excess of the legal rate for the loan and forbearance of another specified sum for a specified period, but must charge the usurious agreement, specifying its terms, and the particular facts relied upon to bring it within the prohibitive clause of the section. The reason is that the receiving or exacting of a greater rate of interest than is authorized by statute may or may not constitute usury, according to the circumstances; for, in order to constitute usury, it must appear that the exaction and reception of the additional interest was in pursuance of a mutual agreement between the parties, and this agreement must be alleged and proved.<sup>21</sup>

And where the statute (Pen. Law N. Y. [Consol. Laws, c. 40] § 2400), requires the receipt of usurious interest in order to render the lender guilty of a crime, the mere corrupt agreement to exact or receive it, which would suffice as a defense in a civil action on the contract, will not suffice to secure a conviction. And therefore, in a civil action, where the defendant seeks an examination of the plaintiff in or-

Hollis v. Covenant Building & Loan Ass'n, 104 Ga. 318, 31 S. E. 215; Ansley v. Bank of Piedmont, 113 Ala. 467, 479, 21 South. 59, 59 Am. St. Rep. 122; Von Haus v. Soule, 146 App. Div. 731, 131 N. Y. Supp. 512; Fenby v. Hunt, 53 Wash. 127, 101 Pac. 492.

<sup>19</sup> *Rosenstein v. Fox*, 150 N. Y. 354, 363, 44 N. E. 1027; *Guggenheimer v. Geiszler*, 81 N. Y. 293; *Telford v. Garrels*, 132 Ill. 550, 554, 24 N. E. 573.

<sup>20</sup> *White v. Benjamin*, 138 N. Y. 623, 33 N. E. 1037; *Taylor v. Morris*, 22 N. J. Eq. 606; *Poppleton v. Nelson*, 12 Or. 349, 7 Pac. 492.

<sup>21</sup> *People v. Hubbard*, 10 Misc. Rep. 104, 31 N. Y. Supp. 114.

der to learn the details of the original transaction of which he is ignorant, in order that he may plead them in connection with the defense of usury, the plaintiff cannot object that the examination would compel the disclosure of facts constituting a criminal offense, if, for all that appears, it would only disclose an agreement for, and not a receipt of, usurious interest.<sup>22</sup>

### 34. EQUITABLE RELIEF AGAINST IMPROVIDENT BARGAINS

"From an early period equity has relieved against usurious contracts by requiring payment of the principal debt and legal interest. \* \* \* It would not, as is supposed, follow the repeal of all usury laws, that even then courts of equity would refuse to afford relief. 'No usury laws now exist in England, having been repealed by statute. It has nevertheless been decided that the repeal of these laws did not alter the doctrine by which the court of chancery affords relief against improvident and extravagant bargains.'"<sup>23</sup> Thus an agreement, made in advance, to pay compound interest, save in certain excepted cases, elsewhere considered, although not usurious, is not enforceable.<sup>24</sup>

### 35. EQUITABLE RELIEF AGAINST USURIOUS TRANSACTION

When a borrower on usurious interest "comes into a court of equity to ask for relief by having the transaction set aside equity will not afford him redress, except upon the terms of his returning the amount actually borrowed, with lawful interest."<sup>25</sup> This rule has been changed, so far as concerns suits by borrowers, in New York, by statute.<sup>26</sup> But the term "borrower," in the New York statute last

<sup>22</sup> Fox v. Miller, 20 App. Div. 333, 46 N. Y. Supp. 837.

<sup>23</sup> Bisp. Eq. § 222. Higgins v. Lansingh, 154 Ill. 301, 370, 40 N. E. 362; Cate v. Merrill, 109 Me. 424, 84 Atl. 897.

<sup>24</sup> Van Benschooten v. Lawson, 6 Johns. Ch. (N. Y.) 313, 10 Am. Dec. 333; Young v. Hill, 67 N. Y. 162, 23 Am. Rep. 99; Higgins v. Lansingh, 154 Ill. 301, 370, 40 N. E. 362; Bowman v. Neely, 137 Ill. 443, 27 N. E. 758. But see Boyce v. Fisk, 110 Cal. 107, 42 Pac. 473.

<sup>25</sup> Bisp. Eq. § 43; Hubbard v. Tod, 171 U. S. 474, 19 Sup. Ct. 14, 43 L. Ed. 246; Holden Land & Live Stock Co. v. Interstate Trading Co., 233 U. S. 536, 34 Sup. Ct. 661, 58 L. Ed. 1083.

<sup>26</sup> General Business Law (Consol. Laws, c. 20) §§ 375, 377. See, also, Scott v. Austin, 36 Minn. 460, 32 N. W. 89, 864; Krumsieg v. Missouri, K. & T. Trust Co. (C. C.) 71 Fed. 350; Mathews v. Missouri, K. & T. Trust Co., 69 Minn. 318, 72 N. W. 121; Kaufman v. Schwartz, 174 App. Div. 239, 160 N. Y. Supp. 1056.

cited, is used in its literal sense. It does not apply to his sureties, his grantees, or his devisees, or his assignee in bankruptcy. The act was intended to confer a special and peculiar privilege upon the actual borrower, and is purely personal. The devisee, for example, cannot secure equitable relief against a usurious mortgage placed on the land devised by his devisor, without offering to pay the principal, with legal interest.<sup>27</sup>

### 36. WAIVER OF USURY

Even where a statute declares usurious agreements void, they are void only in a limited sense. They are not so absolutely void that the borrower is prevented from making payment if he desires; and, if he voluntarily does this, he cannot reclaim the money thus paid. Nor are they so far void that the borrower is not at liberty to deduct the payment of the debt. Thus the maker of a general assignment for the benefit of creditors may lawfully include in it, and direct the payment of, a usurious debt; so the borrower of money upon a usurious contract, which is secured by a mortgage upon land, upon making sale of the land may lawfully contract with his vendee for the payment of the usurious mortgage, and the vendee will not then be at liberty to set up the objection of usury.<sup>28</sup>

But subsequent grantees of the mortgaged premises, with no agreement to either assume or take subject to the prior and usurious mortgage, may, upon foreclosure, set up the defense of usury, even though judgment has been rendered against the mortgagor, establishing the validity of the mortgage, if such judgment was subsequent to the purchase of the land; for after that date the mortgagor cannot do any act to affect his grantee.<sup>29</sup>

### 37. ESTOPPEL

The doctrine of estoppel extends to the case of usury and in appropriate cases prevents the borrower from setting up that defense. But it is subject to the qualification that the person by whom it is invoked

<sup>27</sup> *Buckingham v. Corning*, 91 N. Y. 525; *Hubbard v. Tod*, 171 U. S. 474, 19 Sup. Ct. 14, 43 L. Ed. 246. See *Muller v. City of Philadelphia*, 208 N. Y. 182, 101 N. E. 762.

<sup>28</sup> *Berdan v. Sedgwick*, 44 N. Y. 626, 630; *Chapuis v. Mathot*, 91 Hun, 565, 36 N. Y. Supp. 835, affirmed 155 N. Y. 641, 49 N. E. 1094; *Cole v. Savage*, 10 Paige (N. Y.) 583; *Hartley v. Harrison*, 24 N. Y. 171; *Murray v. Judson*, 9 N. Y. 73, 58 Am. Dec. 516; *Chapin v. Thompson*, 89 N. Y. 270.

<sup>29</sup> *Berdan v. Sedgwick*, 44 N. Y. 626. See *National Loan & Investment Co. of Detroit, Mich., v. Stone* (Tex. Civ. App.) 46 S. W. 67; *Building & Loan Ass'n of Dakota v. Price*, 18 Tex. Civ. App. 370, 46 S. W. 92; *People's Building & Loan Ass'n v. Sellars*, 19 Tex. Civ. App. 201, 46 S. W. 370.

must not be a stranger to the transaction, or one whose conduct the declaration was not designed to influence. Thus, where an assignee for value takes a chose in action—for example, a bond and mortgage—by assignment, in reliance upon the debtor's explicit written declaration that he has no defense or set-off to the debt assigned, and that it will be good and valid in the hands of an assignee, the debtor cannot set up in defense, on foreclosure, that the bond and mortgage are void for usury; and this is true although the plaintiff in foreclosure is a second assignee, so that the debtor did not have him specifically in mind in executing the declaration, for the circumstances are such as to entitle the second assignee to rely on the declaration.<sup>30</sup>

But where the borrower deceives the lender into believing that he, the lender, is not lending at a usurious rate, but buying a bond and mortgage from a prior holder at a discount, the transaction, being really a loan at more than the legal rate of interest and contrary to the policy of the usury statute, is void; but the innocent lender may recover back his consideration with interest.<sup>31</sup>

### 38. PURGING FROM USURY

A usurious contract can be purged of the taint of usury, and money loaned upon a usurious contract can furnish a valid consideration for a promise to pay the money actually loaned. If the usurious contract be mutually abandoned by the parties, and the securities be canceled or destroyed so that they can never be made the foundation of an action, and the borrower subsequently makes a contract to pay the amount actually received by him, this last contract will not be tainted with the original usury, and can be enforced.<sup>32</sup>

So, where a new promise to pay an usurious debt is given in another state to which the debtor has removed and whose law permits such a

<sup>30</sup> *Weyh v. Boylan*, 85 N. Y. 394, 39 Am. Rep. 669; *Mechanics' Bank of Brooklyn v. Townsend*, 29 Barb. (N. Y.) 569; *Stoll v. Reel*, 11 Misc. Rep. 461, 32 N. Y. Supp. 737; *Horn v. Cole*, 51 N. H. 287, 12 Am. Rep. 111; *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616; *Ashton's Appeal*, 73 Pa. 153; *Ryall v. Rowles*, 2 White & T. Lead. Cas. Eq. pt. 2, p. 1673.

<sup>31</sup> *Verity v. Sternberger*, 62 App. Div. 112, 70 N. Y. Supp. 894, affirmed 172 N. Y. 633, 65 N. E. 1123; *Schantz v. Solscheck*, 167 App. Div. 202, 152 N. Y. Supp. 851.

<sup>32</sup> *Sheldon v. Haxtun*, 91 N. Y. 124, 132; *McConkey v. Petterson*, 15 App. Div. 77, 44 N. Y. Supp. 286; *Kilbourn v. Bradley*, 3 Day (Conn.) 356, 3 Am. Dec. 273; *Houser v. Planters' Bank of Ft. Valley*, 57 Ga. 95; *Vermeule v. Vermeule*, 95 Me. 138, 49 Atl. 608; *Blohm v. Hannan*, 82 N. J. Eq. 192, 88 Atl. 622.

contract,<sup>33</sup> or where the new promise is given after the usury statute is repealed.<sup>34</sup> And so generally a new promise purged of the taint of usury may be supported by the past consideration.<sup>35</sup>

<sup>33</sup> *Sheldon v. Haxtun*, 91 N. Y. 124.

<sup>34</sup> *Flight v. Reed*, 1 Hurl. & C. 703; *Hammond v. Hopping*, 13 Wend. (N. Y.) 505. But see *Ludlow v. Hardy*, 38 Mich. 690, and dissenting opinion in *Flight v. Reed*.

<sup>35</sup> *Clark on Cont.* (3d Ed.) § 80.



# ARBITRATION AND AWARD

1. In General.
2. Parties.
3. Subject-Matter.
4. The Arbitrators.
5. The Submission.
6. Revocation.
7. Proceedings.
8. Award.
9. Impeachment.
10. Effect.
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## IN GENERAL

1. Arbitration is the investigation and determination of disputed matters by one or more unofficial persons, called "arbitrators" or "referees," chosen by the parties to the controversy.

The term "arbitration" is often broadly used to include all the various steps in the settlement of a controversy by reference to third persons, and in this sense to embrace the award; but a more strict use confines its meaning to the submission and the hearing, the decision being separately spoken of as the "award."<sup>1</sup> The distinguishing feature of an arbitration is that it amounts to a substitution, by the parties, of judges of their own selection for the usual remedies offered by the courts, under an agreement, expressed or implied, that the unprejudiced decision of these persons, after a full and fair hearing, shall be binding and final.<sup>2</sup> But while a submission to arbitration is thus, to an extent, a taking of the controversy out of the hands of the courts, its scope, procedure, and effect are limited and controlled by certain well-defined rules which make up what is technically called the "law of arbitration and award." Most of these rules have for their object the protection of each party from the fraud or unfairness of the other or of the arbitrator and to secure an unprejudiced decision upon the merits of the controversy as presented by the parties. If these results are reached, the settlement will generally be upheld, regardless of any lack of formality in the proceedings.<sup>3</sup>

<sup>1</sup> Black, Law Dict.

<sup>2</sup> Abb. Law Dict.

<sup>3</sup> See, generally, cases cited under note 25, p. 371.

## PARTIES

2. Generally, the power of a party to a controversy to submit it to arbitration is coextensive with his capacity and authority to contract relative to the subject-matter. But to this rule may be made the following exceptions:
  - (a) Agents, from a general authority to contract, have no implied power to arbitrate.
  - (b) Partners have no general power to bind their copartners by a submission to arbitration.
  - (c) Officers of the United States have no power, as such, to refer matters arising out of the public business under their control.

*In General*

As to the contractual capacity of the parties, an agreement to submit a disputed matter to arbitration is governed by the general law of contracts.<sup>4</sup> But, in addition to being legally competent to contract, the parties to a submission must have such control over the subject-matter as will enable them to perform any legal award that may be made.<sup>5</sup> The power to submit to arbitration generally grows out of the power or authority to compromise<sup>6</sup> or to prosecute or defend a suit relative to the subject-matter;<sup>7</sup> and it might be laid down as a general rule that any person competent to contract in an individual or a representative capacity may submit to arbitration any civil controversy for the determination of which he has the right or authority to prosecute a suit. From these principles it follows that the submission of an infant in his own right is voidable at his election;<sup>8</sup> since he

<sup>4</sup> *Morse*, Arb. 3; *Caldw.* Arb. 15; *Russ.* Arb. 15; *Shelf v. Baily*, 1 Comyn, 183; *Brady v. Mayor, etc., of City of Brooklyn*, 1 Barb. (N. Y.) 584; *Burrell v. Jones*, 3 Barn. & Ald. 47; *Blair v. Wallace*, 21 Cal. 317; *Cox v. Jagger*, 2 Cow. (N. Y.) 638, 14 Am. Dec. 522; *Weed v. Ellis*, 3 Caines (N. Y.) 254.

<sup>5</sup> *Morse*, Arb. 3. Thus, a religious corporation, which has no power, without consent of the Supreme Court, to sell its real estate, cannot submit to arbitration the question whether it shall be sold. *Wyatt v. Benson*, 23 Barb. (N. Y.) 327; *District of Columbia v. Bailey*, 171 U. S. 161, 18 Sup. Ct. 868, 43 L. Ed. 118.

<sup>6</sup> *Schoff v. Town of Bloomfield*, 8 Vt. 472.

<sup>7</sup> *Buckland, Inhabitants of, v. Inhabitants of Conway*, 16 Mass. 396; *Alexandria Canal Co. v. Swann*, 5 How. 83, 12 L. Ed. 60; *Somers v. Balabrega*, 1 Dall. 164, 1 L. Ed. 83; *Brady v. Mayor, etc., of City of Brooklyn*, 1 Barb. (N. Y.) 584.

<sup>8</sup> *Russ.* Arb. 18; *Morse*, Arb. 4; *Bac. Abr.* "Arbitration," C; *Godfrey v. Wade*, 6 Moore, 488; *Rudston v. Yates*, March, 111, 141; *Baker v. Lovett*, 6 Mass. 78, 4 Am. Dec. 88; *Britton v. Williams' Devises*, 6 Munf. (Va.) 453.

has neither capacity to contract nor power to sue. Corporations, both municipal<sup>9</sup> and private,<sup>10</sup> may be parties to a submission, and are bound by an award legally rendered. Administrators<sup>11</sup> and executors<sup>12</sup> may submit claims in favor of or against the estates they represent. The guardian of an infant<sup>13</sup> or a lunatic<sup>14</sup> may submit on behalf of the ward; but a guardian ad litem has no such power.<sup>15</sup> An attorney employed to prosecute or defend a suit may submit it to arbitration<sup>16</sup> without special authority from the client to do so.<sup>17</sup> A mar-

<sup>9</sup> *Brady v. Mayor, etc., of City of Brooklyn*, 1 Barb. (N. Y.) 584; *Kane v. City of Fond du Lac*, 40 Wis. 495; *Buckland, Inhabitants of, v. Inhabitants of Conway*, 16 Mass. 396; *Schoff v. Town of Bloomfield*, 8 Vt. 472; *Campbell v. Inhabitants of Upton*, 113 Mass. 67; *City of Shawneetown v. Baker*, 85 Ill. 563. Under a statute giving selectmen of a town power "to audit, and in their discretion to allow, the claim of any person against the town for money paid or services performed for the town," they have power to submit to arbitration a claim against the town for building a bridge. *Dix v. Town of Dummerston*, 19 Vt. 262.

<sup>10</sup> *Alexandria Canal Co. v. Swann*, 5 How. 83, 12 L. Ed. 60; *Wood v. Auburn & R. R. Co.*, 8 N. Y. 160; *Isaacs v. Beth Hamedash Society*, 1 Hilt. (N. Y.) 469; *Madison Ins. Co. v. Griffin*, 3 Ind. 277; *Memphis & C. R. Co. v. Scruggs*, 50 Miss. 284; *Proprietors of Fryeburg Canal v. Frye*, 5 Greenl. (Me.) 38; *Merchants' Bank of Macon v. Taylor*, 21 Ga. 334.

<sup>11</sup> *Worthington v. Barlow*, 7 Term R. 453; *Barry v. Rush*, 1 Term R. 691; *Lyle v. Rodgers*, 5 Wheat. 394, 5 L. Ed. 117; *Dickey v. Sleeper*, 13 Mass. 244; *Coffin v. Cottle*, 4 Pick. (Mass.) 454; *Bean v. Farnam*, 6 Pick. (Mass.) 269; *Bacon v. Crandon*, 15 Pick. (Mass.) 79; *Jones v. Deyer*, 16 Ala. 221; *Russell v. Lane*, 1 Barb. (N. Y.) 519; *Chadbourn v. Chadbourn*, 9 Allen (Mass.) 173; *Eaton v. Cole*, 10 Me. 137; *Kendall v. Bates*, 35 Me. 357; *Merchants' Bank of Macon v. Taylor*, 21 Ga. 334; *Wheatley v. Martin's Adm'r*, 6 Leigh (Va.) 62; *Alling v. Munson*, 2 Conn. 691. But when the statute expressly requires all claims against the estate to be adjusted in a particular way, the administrator cannot resort to arbitration. *Clark v. Hogle*, 52 Ill. 427; *Reitzell v. Miller*, 25 Ill. 67; *Yarborough v. Leggett*, 14 Tex. 677.

<sup>12</sup> *Morse, Arb.* 19; *Russ. Arb.* 29; *Bac. Abr. "Arbitrament," C*; *Wood v. Tunnickliff*, 74 N. Y. 38; *Logsdon v. Roberts' Ex'rs*, 3 T. B. Mon. (Ky.) 255; *Overly's Ex'r v. Overly's Devises*, 1 Metc. (Ky.) 117; and cases cited in note 11, *supra*.

<sup>13</sup> *Wats. Arb.* 41; *Weed v. Ellis*, 3 Caines (N. Y.) 253; *Strong v. Beroujon*, 18 Ala. 168; *Goleman v. Turner*, 14 Smedes & M. (Miss.) 118; *McComb v. Turner*, 14 Smedes & M. (Miss.) 119.

<sup>14</sup> *Hutchins v. Johnson*, 12 Conn. 376; *Weston v. Stuart*, 11 Me. 326; *Bean v. Farnam*, 6 Pick. (Mass.) 269; and cases cited in preceding note.

<sup>15</sup> *Hannum's Heirs v. Wallace*, 9 Humph. (Tenn.) 129; *Frazier v. Pankey*, 1 Swan (Tenn.) 75; *Fort v. Battle*, 13 Smedes & M. (Miss.) 133. See, also, *Wheatley's Lessee v. Harvey*, 1 Swan (Tenn.) 484.

<sup>16</sup> 2 Pars. Cont. 688; *Morse, Arb.* 15; *Russ. Arb.* 25; *Somers v. Balabrega*, 1 Dall. 164, 1 L. Ed. 83; *Wilson v. Young*, 9 Pa. 101; *Holker v. Parker*, 7 Cranch, 436, 3 L. Ed. 396; *Evans v. Kamphaus*, 59 Pa. 379; *Babb v. Stromberg*, 14 Pa.

<sup>17</sup> See footnote 17 on following page.

ried woman may refer a dispute relating to property of which she has absolute control and independent power of disposal; and she will be bound by any submission by the husband, where he has power to carry out the award without her joinder or consent, or where such joinder would be enforced by law, if necessary to the performance of the award.<sup>18</sup>

### *Agents*

An agent cannot make a submission in behalf of his principal unless the authority to do so is expressly given or arises by necessary implication from the powers conferred;<sup>19</sup> for otherwise the submission would be, in effect, an unwarranted delegation of the agent's power to bind his principal.<sup>20</sup> No power to submit to arbitration is implied from a general authority to contract,<sup>21</sup> or to collect<sup>22</sup> or "settle"<sup>23</sup> claims or accounts. But it seems that any authority to an agent to secure or enforce any kind of a judicial determination of the

397; *Stokely v. Robinson*, 34 Pa. 315; *Talbot v. McGee*, 4 T. B. Mon. (Ky.) 375; *Beverly v. Stephens*, 17 Ala. 701; *Town of Alton v. Town of Gilmanton*, 2 N. H. 520; *Williams v. Danziger*, 91 Pa. 232. But the client may revoke the submission, in some cases, before it is acted upon. *Wilson v. Young*, 9 Pa. 101; *Coleman v. Grubb*, 23 Pa. 393; *Bingham's Trustees v. Guthrie*, 19 Pa. 418.

<sup>17</sup> "It is believed to be the practice throughout the Union for suits to be referred by consent of counsel without special authority, and this universal practice must be founded on a general conviction that the power of an attorney at law over the cause of his client extends to such a rule." *Marshall, C. J.* in *Holker v. Parker*, 7 Cranch, 436, 3 L. Ed. 396. See, also, *Filmer v. Delber*, 3 Taunt. 486. See *Attorney and Client*, p. 119.

<sup>18</sup> *Morse*, Arb. 26; *Bac. Abr. "Arbitration," C*; *Fort v. Battle*, 13 Smedes & M. (Miss.) 133; *McComb v. Turner*, 14 Smedes & M. (Miss.) 119; *Lumley v. Hutton*, Cro. Jac. 447; *Memphis & C. R. Co. v. Scruggs*, 50 Miss. 284. See, also, *Spurck v. Crook*, 19 Ill. 415.

<sup>19</sup> *Bacon v. Dubarry*, 1 Ld. Raym. 246; *Cox v. Fay*, 54 Vt. 446; *Trout v. Emmons*, 29 Ill. 433, 81 Am. Dec. 326; *Gibbs v. Holcomb*, 1 Wis. 23; *Scarborough v. Reynolds*, 12 Ala. 252; *Ingraham v. Whitmore*, 75 Ill. 24; *Michigan Cent. R. Co. v. Gougar*, 55 Ill. 503; *Lowenstein v. McIntosh*, 37 Barb. (N. Y.) 251. Authority to an agent to make the submission does not empower him to ratify the award, when made. *Bullitt v. Musgrave*, 3 Gill (Md.) 31. See *Factors* p. 160, and *Brokers*, p. 198, ante.

<sup>20</sup> But the unauthorized submission by an agent may be ratified by the principal, and thus rendered binding. *Diedrick v. Richley*, 2 Hill (N. Y.) 271; *Perry v. Mulligan*, 58 Ga. 479; *Furber v. Chamberlain*, 29 N. H. 405; *Memphis & C. R. Co. v. Scruggs*, 50 Miss. 284; *Isaacs v. Beth Hamedash Society*, 1 Hilt. (N. Y.) 469.

<sup>21</sup> *Story*, Ag. § 98; *Bacon v. Dubarry*, 1 Ld. Raym. 246; *Trout v. Emmons*, 29 Ill. 433, 81 Am. Dec. 326; *Scarborough v. Reynolds*, 12 Ala. 252.

<sup>22</sup> See *Pars. Cont.* 689; *Morse*, Arb. 11, and cases there cited.

<sup>23</sup> *Mechem*, Ag. § 405; *Huber v. Zimmerman*, 21 Ala. 488, 56 Am. Dec. 255; *Michigan Cent. R. Co. v. Gougar*, 55 Ill. 503; *Scarborough v. Reynolds*, 12 Ala. 252.

matter, or which gives him absolute control over it, will imply power to arbitrate. Thus, authority to prosecute or defend a suit gives by implication power to submit it to arbitration.<sup>24</sup> Authority to "compromise" a claim has been held to warrant a reference by the agent;<sup>25</sup> and the same effect has been given to a general authority to act for a partner in the dissolution of the firm and settlement of its business.<sup>26</sup>

### *Partners*

A submission by one partner without special authority is not binding on his copartners.<sup>27</sup> This is unquestioned so far as concerns submissions by an instrument requiring a seal.<sup>28</sup> And while there are cases upholding the power of one partner to bind the firm by a parol submission not specially authorized,<sup>29</sup> the weight of authority clearly sustains the rule that such submissions are not binding on copartners not consenting thereto before the award is rendered.<sup>30</sup> In such cases the partner making the unauthorized submission is alone bound.<sup>31</sup>

<sup>24</sup> *Buckland, Inhabitants of, v. Inhabitants of Conway*, 16 Mass. 396; *Wilson v. Young*, 9 Pa. 101; *Somers v. Balabrega*, 1 Dall. 164, 1 L. Ed. 83.

<sup>25</sup> *Schoff v. Town of Bloomfield*, 8 Vt. 472.

<sup>26</sup> *Henley v. Soper*, 8 Barn. & C. 16.

<sup>27</sup> *Morse, Arb.* 7; *Russ. Arb.* 20; 1 *Pars. Cont.* 191; 1 *Lindl. Partn.* 129; *Karthaus v. Ferrer*, 1 Pet. 222, 7 L. Ed. 121; *St. Martin v. Thrasher*, 40 Vt. 460; *Antram v. Chace*, 15 East, 209; *Stead v. Salt*, 10 Moore, 389; *Fancher v. Bibb Furnace Co.*, 80 Ala. 481, 2 South. 268; *Wood v. Shepherd*, 2 Pat. & H. (Va.) 442; *Walker v. Bean*, 34 Minn. 427, 26 N. W. 232; *Buchoz v. Grandjean*, 1 Mich. 367; *Jones v. Bailey*, 5 Cal. 345; *Harrington v. Higham*, 13 Barb. (N. Y.) 660; *Hoffman v. Westlecraft*, 85 N. J. Law, 484, 89 Atl. 1006.

<sup>28</sup> *Backus v. Coyne*, 35 Mich. 5; *Savercool v. Farwell*, 17 Mich. 321; *Buchanan v. Curry*, 19 Johns. (N. Y.) 137, 10 Am. Dec. 200; *Karthaus v. Ferrer*, 1 Pet. 222, 7 L. Ed. 121; *Davis v. Berger*, 54 Mich. 652, 20 N. W. 629; *McBride v. Hagan*, 1 Wend. (N. Y.) 326; *St. Martin v. Thrasher*, 40 Vt. 460; *Abbott v. Dexter*, 6 Cush. (Mass.) 108; and cases cited in preceding note.

<sup>29</sup> Such is the law, in Illinois, Ohio, Kentucky, and Pennsylvania. See *Hallack v. March*, 25 Ill. 48; *Wilcox v. Singletary*, *Wright (Ohio)* 420; *Southard v. Steele*, 3 T. B. Mon. (Ky.) 435; *Taylor v. Coryell*, 12 Serg. & R. (Pa.) 243; *Gay v. Waltman*, 89 Pa. 453.

<sup>30</sup> See, generally, cases cited in notes 27, 28, and 31. Also, *Eastman v. Burleigh*, 2 N. H. 484; *Horton v. Wilde*, 8 Gray (Mass.) 425; *Mackay v. Bloodgood*, 9 Johns. (N. Y.) 285; *Tillinghast v. Gilmore*, 17 R. I. 413, 22 Atl. 942. But the assent of the partner may be presumed where he is present at the hearing, and fails to object. See *Hallack v. March*, 25 Ill. 33.

<sup>31</sup> 1 *Lindl. Partn.* 129; *Buchanan v. Curry*, 19 Johns. (N. Y.) 137, 10 Am. Dec. 200; *Strangford v. Green*, 2 Mod. 228; *Harrington v. Higham*, 13 Barb. (N. Y.) 660; *McBride v. Hagan*, 1 Wend. (N. Y.) 326; *Smith v. Van Nostrand*, 5 Hill (N. Y.) 419; *Karthaus v. Ferrer*, 1 Pet. 222, 7 L. Ed. 121. An unauthorized submission by a partner may operate as a release of the partnership claim where he accepts the amount awarded in favor of the firm, and indorses a re-

*United States Officers*

It is not within the general powers of an officer of the United States to submit to arbitration any matter involving the rights of the government.<sup>32</sup> The denial of this power is put upon the ground that, as the Constitution has vested the judicial power in the Supreme and inferior courts, no officer of the government can vest it elsewhere. Such a submission, it is said, must be based on special authority given by an act of Congress.

**SUBJECT-MATTER**

### 3. Any actual doubt or dispute which the parties might legally settle by contract may be submitted by them to arbitration.

A doubtful or disputed matter, to come within the meaning of this rule, must be of such a character that its determination will require an exercise of judicial discretion on the part of the arbitrator, and not merely the performance of a ministerial act.<sup>33</sup> A doubt or uncertainty which an application of the ordinary rules of calculation or measurement would remove will not serve as the basis of an arbitration. Thus, a surveyor chosen to establish a boundary line,<sup>34</sup> an accountant to examine the accounts of the parties and report a balance,<sup>35</sup> a clerk to calculate the interest on a note and determine the amount due,<sup>36</sup> persons chosen to determine the difference to be paid in an exchange of slaves,<sup>37</sup> are generally not regarded as arbitrators, nor are their reports given the conclusiveness of awards.<sup>38</sup> The same may be said generally of persons chosen to appraise property according to their own judgment of its value;<sup>39</sup> although in some cases appraisers

receipt on the award. *Buchanan v. Curry*, 19 Johns. (N. Y.) 137, 10 Am. Dec. 200.

<sup>32</sup> *U. S. v. Ames*, 1 Woodb. & M. 76, Fed. Cas. No. 14,441.

<sup>33</sup> *Morse*, Arb. 36; *Leeds v. Burrows*, 12 East, 1; *Hale v. Handy*, 26 N. H. 206; *Norton v. Gale*, 95 Ill. 533, 35 Am. Rep. 173; *McKinney v. Page*, 32 Me. 513; *Terry v. Chandler*, 16 N. Y. 354, 69 Am. Dec. 707; *Elmendorf v. Harris*, 5 Wend. (N. Y.) 521; *Lee v. Hemingway*, 3 Nev. & M. 860.

<sup>34</sup> *Thayer v. Bacon*, 3 Allen (Mass.) 163, 80 Am. Dec. 59.

<sup>35</sup> *Stage v. Gorich*, 107 Ill. 361; *Kelly v. Crawford*, 5 Wall. 785, 18 L. Ed. 562.

<sup>36</sup> *Grimes v. Blake*, 16 Ind. 160.

<sup>37</sup> *Curry v. Lackey*, 35 Mo. 389.

<sup>38</sup> But see *Illinois & M. Canal, Board of Trustees of, v. Lynch*, 5 Gilman (Ill.) 521; *McAvoy v. Long*, 13 Ill. 147; *Robbins v. Clark*, 129 Mass. 145; *Oakes v. Moore*, 24 Me. 214, 41 Am. Dec. 379.

<sup>39</sup> See cases cited in note 33 supra. Also, *Garred v. Macey*, 10 Mo. 161; *Curry v. Lackey*, 35 Mo. 389; *Van Cortlandt v. Underhill*, 17 Johns. (N. Y.) 405; *Toledo S. S. Co. v. Zenith Transportation Co.*, 184 Fed. 391, 103 C. C. A. 501.

have been regarded as arbitrators.<sup>40</sup> The reference of a matter concerning which no dispute exists, for the purpose of preventing future differences from arising, is not regarded as a submission to arbitration.<sup>41</sup> But the matter need not be involved in a pending suit;<sup>42</sup> it is sufficient that it be actually disputed, or even merely doubted.<sup>43</sup> It need not consist solely of questions of fact; for a pure question of law may be submitted.<sup>44</sup> Generally, any controversy concerning real<sup>45</sup> or personal<sup>46</sup> property or an injury thereto<sup>47</sup> may be adjusted by arbitration. While criminal matters cannot be submitted, a civil claim for damages, growing out of an act punishable as a crime, may be so adjusted,<sup>48</sup> even after indictment.<sup>49</sup>

<sup>40</sup> See *Smith v. Boston, C. & M. Railroad Co.*, 36 N. H. 458; *Underhill v. Van Cortlandt*, 2 Johns. Ch. (N. Y.) 339; *Leonard v. House*, 15 Ga. 473; *Efner v. Shaw*, 2 Wend. (N. Y.) 567; *Oakes v. Moore*, 24 Me. 214, 41 Am. Dec. 379.

<sup>41</sup> *Stose v. Heissler*, 120 Ill. 433, 11 N. E. 161, 60 Am. St. Rep. 563; *Norton v. Gale*, 95 Ill. 533, 35 Am. Rep. 173.

<sup>42</sup> *Titus v. Scantling*, 4 Blackf. (Ind.) 89.

<sup>43</sup> *Brown v. Wheeler*, 17 Conn. 345, 44 Am. Dec. 550; *Findly v. Ray*, 50 N. C. 125; *Mayo v. Gardner*, 49 N. C. 359; *Higgins v. Kinneady*, 20 Iowa, 474.

<sup>44</sup> *Ching v. Ching*, 6 Ves. 282; *Green v. Ford*, 17 Ark. 586; *Strawbridge v. Funstone*, 1 Watts & S. (Pa.) 517; *Jones v. Boston Mill Corp.*, 6 Pick. (Mass.) 148; *Smith v. Thorndike*, 8 Greenl. (Me.) 119; *Kleine v. Catara*, 2 Gall. 61, Fed. Cas. No. 7,869; *In re Johnson*, 87 Neb. 375, 127 N. W. 133.

<sup>45</sup> *Caldw. Arb.* 1; *Morse, Arb.* 54; *Knight v. Burton*, 6 Mod. 231; *Round v. Hatton*, 10 Mees. & W. 660; *McMullen v. Mayo*, 8 Smedes & M. (Miss.) 298; *Jones v. Boston Mill Corp.*, 6 Pick. (Mass.) 148; *Clark v. Burt*, 4 Cush. (Mass.) 396; *Akely v. Akely*, 16 Vt. 450; *Sellick v. Addams*, 15 Johns. (N. Y.) 197; *Carey v. Wilcox*, 6 N. H. 177; *Byers v. Van Deusen*, 5 Wend. (N. Y.) 268; *Munro v. Alaire*, 2 Caines (N. Y.) 320; *Davis v. Havard*, 15 Serg. & R. (Pa.) 165, 16 Am. Dec. 537; *Page v. Foster*, 7 N. H. 392; *Hunter v. Rice*, 15 East, 100; *McCracken v. Clarke*, 31 Pa. 498; *Blair v. Wallace*, 21 Cal. 318. A dispute as to a division line between two tracts of land may be submitted. *Jones v. Dewey*, 17 N. H. 596; *Bowen v. Cooper*, 7 Watts (Pa.) 311; *Page v. Foster*, 7 N. H. 392. An action of ejectment may be referred. *Austin v. Snow's Lessee*, 2 Dall. 157, 1 L. Ed. 329; *Harvey v. Snow*, 1 Yeates (Pa.) 156; *Duer v. Boyd*, 1 Serg. & R. (Pa.) 203.

But the final determination of a title to real property cannot be submitted to arbitration. 5 Corpus Juris, p. 28. Statutes often expressly prohibit it. *Id.* See Code Civ. Proc. N. Y. § 2365.

<sup>46</sup> See, generally, cases cited in note 45, *supra*. Also, *Penniman v. Rodman*, 13 Metc. (Mass.) 382; *Munro v. Alaire*, 2 Caines (N. Y.) 320; *McMullen v. Mayo*, 8 Smedes & M. (Miss.) 298; *De Long v. Stanton*, 9 Johns. (N. Y.) 38.

<sup>47</sup> *Fitch v. Constantine Hydraulic Co.*, 44 Mich. 74, 6 N. W. 91; *Fitch v. Taft*, 126 Mass. 503.

<sup>48</sup> *Morse, Arb.* 53; *Baker v. Townshend*, 1 Moore, 120; *Noble v. Peebles*, 13 Serg. & R. (Pa.) 319; *Ligon v. Ford*, 5 Munf. (Va.) 10. See, also, *Yates v. Russell*, 17 Johns. (N. Y.) 461; *People v. Bishop*, 5 Wend. (N. Y.) 111.

<sup>49</sup> *Noble v. Peebles*, 13 Serg. & R. (Pa.) 319.

## THE ARBITRATORS

### 4. Any one having no concealed interest in the matter submitted is competent to act as arbitrator, whether legally competent to contract or not.

The arbitrators are the persons selected as judges to hear and determine the controversy; and it is said that a party may select whom he pleases to act as his judge.<sup>50</sup> Whatever may have been the rule formerly,<sup>51</sup> it is now well settled that neither infancy, idiocy, lunacy, coverture, nor any other natural or legal disability will disqualify a person to act as arbitrator.<sup>52</sup> Nor will a known interest in the subject-matter of the submission.<sup>53</sup> But if an arbitrator has a substantial interest in the controversy not known to the parties, and which is of such a nature that it might affect his decision,<sup>54</sup> or if other circumstances tending to create prejudice exist, such as a relationship between the arbitrator and one of the parties, which fact is not known to the other, the award may be set aside on this ground.<sup>55</sup> But an objection to an arbitrator because of any interest or incompetency known to or discovered by the party in the course of the proceedings may

<sup>50</sup> Russ. Arb. 111; Morse, Arb. 99; Vin. Abr. "Arbitration," A, 2.

<sup>51</sup> Russ. Arb. 111; Com. Dig. "Arbitrament," C.

<sup>52</sup> Russ. Arb. 111; Bac. Abr. "Arbitration," D; Huntig v. Ralling, 8 Dowl. 879; Evans v. Ives, 15 Phila. (Pa.) 635 (as to competency of married woman).

<sup>53</sup> Fisher v. Towner, 14 Conn. 26; Brown v. Leavitt, 26 Me. 251; Hubbard v. Hubbard, 61 Ill. 228.

<sup>54</sup> Earl v. Stocker, 2 Vern. 251; Rand v. Redington, 13 N. H. 72, 38 Am. Dec. 475; Inhabitants of Leominster v. Fitchburg & W. R. Co., 7 Allen (Mass.) 38; Spearman v. Wilson, 44 Ga. 473.

<sup>55</sup> Brown v. Leavitt, 26 Me. 251; Pool v. Hennessy, 39 Iowa, 192, 18 Am. Rep. 44. An employé of one of the parties is a competent arbitrator. Howard v. Pensacola & A. R. Co., 24 Fla. 560, 5 South. 356. An alderman is a competent arbitrator in a case to which the city is a party. Kane v. City of Fond du Lac, 40 Wis. 495. One who has formerly been counsel for the successful party in another case is not thereby disqualified to act as arbitrator. Goodrich v. Hulbert, 123 Mass. 190, 25 Am. Rep. 60; Cheney v. Martin, 127 Mass. 304. A person who has been subpoenaed as a witness in the case is competent to act as an arbitrator. Temple v. Myers, 16 Pa. Co. Ct. 232. Stockholders in a bank which holds shares of a railroad company pledged it as collateral security by a person of good credit and fair standing, are not disqualified by reason of interest from acting as arbitrators in a case in which the railroad company is a party. Inhabitants of Leominster v. Fitchburg & W. R. Co., 7 Allen (Mass.) 38; Brocklehurst & Potter Co. v. Marsch, 225 Mass. 3, 113 N. E. 646.



be waived,<sup>56</sup> and a waiver is implied from failure to object before the award is made.<sup>57</sup>

### *Umpire and Third Arbitrator*

As a general rule, the parties to the submission each select an arbitrator, and give to them the power to select a third in case of disagreement. This third person is called an "umpire." Generally, under such a submission, the arbitrators need not wait until they have actually disagreed, but may appoint an umpire even before commencing the hearing.<sup>58</sup> The appointment may be by parol, unless the statute, the terms of the submission, or the nature of the subject-matter require it to be in writing;<sup>59</sup> and where the parties appear before the umpire without objection as to the mode of his appointment they cannot afterwards raise the objection that he should have been appointed by written instrument.<sup>60</sup> But an umpire cannot be appointed by parol where it is agreed that the submission shall be made a rule of court.<sup>61</sup> Upon the disagreement of the arbitrators, it is the duty of the umpire to decide, not merely the points upon which the arbitrators have failed to agree, but the whole controversy, exactly as though he had been appointed sole arbitrator in the first instance.<sup>62</sup> He should hear the oral and examine the documentary evidence in the case, and not rely solely on the facts reported by the arbitrators.<sup>63</sup> The award

<sup>56</sup> *Brown v. Leavitt*, 26 Me. 251; *Davis v. Forshee*, 34 Ala. 107; *Fox v. Hazelton*, 10 Pick. (Mass.) 275; *Dougherty v. McWhorter*, 7 Yerg. (Tenn.) 239; *Strong v. Strong*, 9 Cush. 560.

<sup>57</sup> *Robb v. Brachman*, 38 Ohio St. 423; *Monongahela Nav. Co. v. Fenlon*, 4 Watts & S. (Pa.) 205; *Fox v. Hazelton*, 10 Pick. (Mass.) 275; *Anderson v. Burchett*, 48 Kan. 153, 29 Pac. 315; *Brown v. Leavitt*, 26 Me. 251; *Doherty v. Phoenix Ins. Co.*, 224 Mass. 310, 112 N. E. 940.

<sup>58</sup> *Alexandria Canal Co. v. Swann*, 5 How. 83, 12 L. Ed. 60; *Bigelow v. Maynard*, 4 Cush. (Mass.) 317; *Dudley v. Thomas*, 23 Cal. 365; *Newton v. West*, 3 Metc. (Ky.) 24; *McKinstry v. Solomons*, 2 Johns. (N. Y.) 57; *Van Cortlandt v. Underhill*, 17 Johns. (N. Y.) 405; *Butler v. Mayor, etc., of New York*, 1 Hill (N. Y.) 489; *Peck v. Wakely*, 2 McCord (S. C.) 279; *Woodrow v. O'Conner*, 28 Vt. 776; *Stevens v. Brown*, 82 N. C. 460.

<sup>59</sup> *Morse*, Arb. 245; *Bryan v. Jeffreys*, 104 N. C. 242, 10 S. E. 167.

<sup>60</sup> *Knowlton v. Homer*, 30 Me. 552; *Hart v. Kennedy*, 47 N. J. Eq. 51, 20 Atl. 29; *Matter of Grening*, 74 Hun, 62, 26 N. Y. Supp. 117.

<sup>61</sup> *Elmendorf v. Harris*, 23 Wend. (N. Y.) 628, 35 Am. Dec. 587.

<sup>62</sup> *Bates v. Cooke*, 9 Barn. & C. 407; *McKinstry v. Solomons*, 2 Johns. (N. Y.) 57; *Shields v. Renno*, 1 Overt. (Tenn.) 313; *Passmore v. Pettit*, 4 Dall. 271, 1 L. Ed. 830; *Crabtree v. Green*, 8 Ga. 8; *Collings Carriage Co. v. German-American Ins. Co.*, 86 N. J. Eq. 53, 97 Atl. 726.

<sup>63</sup> *Taber v. Jenny*, Spr. 315, Fed. Cas. No. 13,720; *Falconer v. Montgomery*, 4 Dall. 232, 1 L. Ed. 813; *In re Grening*, 74 Hun, 62, 26 N. Y. Supp. 117; *Passmore v. Pettit*, 4 Dall. 271, 1 L. Ed. 830; *Daniel v. Daniel*, 6 Dana (Ky.) 93; *Small v. Courtney*, 1 Brev. (S. C.) 205; *Ingraham v. Whitmore*, 75 Ill. 24;

is his act alone; the joinder of the other arbitrators therein will be rejected as surplusage.<sup>64</sup> But sometimes the submission provides for the selection of a third person in case of disagreement, and stipulates that the award shall then be by concurrence of a majority. In such a case the third person is not an umpire, but a third arbitrator, charged with the same duties and vested with the same powers as a member of the original board.<sup>65</sup>

## THE SUBMISSION

5. The submission is the contract between the parties to refer the dispute and abide by the award of the arbitrators.<sup>66</sup> It may be—

- (a) At common law; either oral, or by written instrument with or without a seal.
- (b) Under the statute; in which case the form and execution of the contract must comply with the statutory provisions.

### *Common-Law Submissions*

Submissions at common law are liberally construed, the intention of the parties being the controlling element.<sup>67</sup> The form of the agree-

*Gaffy v. Hartford Bridge Co.*, 42 Conn. 143; *Alexander v. Cunningham*, 111 Ill. 511. But see *Sharp v. Lipsey*, 2 Bailey (S. C.) 113; *Graham v. Graham*, 9 Pa. 254, 49 Am. Dec. 557; *Byrne v. Usry*, 85 Ga. 219, 11 S. E. 561.

But some cases say that a rehearing is not necessary unless demanded. 5 Corpus Juris, p. 110; *Knowlton v. Homer*, 30 Me. 552; *Matter of Tunno*, 5 B. & Ad. 488. See *Bray v. Staples*, 149 N. C. 89, 62 S. E. 780, 19 L. R. A. (N. S.) 696, 16 Ann. Cas. 555.

<sup>64</sup> *Kile v. Chapin*, 9 Ind. 150; *King v. Cook*, T. U. P. Charlt. (Ga.) 286, 4 Am. Dec. 715; *Tyler v. Webb*, 10 B. Mon. (Ky.) 123; *Rigden v. Martin*, 6 Har. & J. (Md.) 403; *Frissell v. Fickes*, 27 Mo. 557; *Boyer v. Aurand*, 2 Watts (Pa.) 74; *Rison v. Berry*, 4 Rand. (Va.) 275; *Shields v. Renno*, 1 Overt. (Tenn.) 313; *Haven v. Winnisimmet Co.*, 11 Allen (Mass.) 377, 87 Am. Dec. 723; *Ingraham v. Whitmore*, 75 Ill. 24.

<sup>65</sup> *Reade v. Dutton*, 2 Mees. & W. 69; *Lyon v. Blossom*, 4 Duer (N. Y.) 318; *Willis v. Higginbotham*, 61 Miss. 164; *Mullins v. Arnold*, 4 Sneed (Tenn.) 262; *Batley v. Button*, 13 Johns. (N. Y.) 189; *Bassett's Adm'r v. Cunningham's Adm'r*, 9 Grat. (Va.) 684; *Rison v. Berry*, 4 Rand. (Va.) 275; *Haven v. Winnisimmet Co.*, 11 Allen (Mass.) 377, 87 Am. Dec. 723; *Gaffy v. Hartford Bridge Co.*, 42 Conn. 143; *Quay v. Westcott*, 60 Pa. 163.

<sup>66</sup> That agreements to submit to arbitration will not be specifically enforced, see *Keeffe v. National Acc. Soc.*, 4 App. Div. 392, 38 N. Y. Supp. 854; *McGunn v. Hanlin*, 29 Mich. 476; *Corbin v. Adams*, 76 Va. 58; *King v. Howard*, 27 Mo. 21; *Copper v. Wells*, 1 N. J. Eq. 10.

<sup>67</sup> *Wilson v. Getty*, 57 Pa. 266; *Brady v. Mayor, etc., of City of Brooklyn*, 1 Barb. (N. Y.) 584; *Gerrish v. Ayers*, 3 Scam. (Ill.) 245; *Kimball v. Walker*, 30 Ill. 482; *Ross v. Watt*, 16 Ill. 99; *Noble v. Peebles*, 13 Serg. & R. (Pa.) 319; *King v. Jemison*, 33 Ala. 499; *Valentine v. Valentine*, 2 Barb. Ch. (N.

ment must be governed largely by the subject-matter. The submission and the award have the general effect of a single contract between the parties;<sup>68</sup> and therefore it may be said that a verbal submission will be valid when the subject-matter is such that a verbal agreement between the parties in the terms of the award would be valid; but if the statute of frauds would require such a contract to be in writing, or by sealed instrument, the submission and award must be of corresponding dignity.<sup>69</sup> Thus a submission affecting the title to real estate must be under seal;<sup>70</sup> but any other question relative to land, such as a claim for rent,<sup>71</sup> a controversy as to the price to be paid for a certain tract,<sup>72</sup> a claim for damages growing out of a contract relative to land,<sup>73</sup> may be submitted by parol.<sup>74</sup> Where a submission is first made by parol, but is followed by another in writing, the second supersedes the first,<sup>75</sup> even though it provides for a different number of arbitrators.<sup>76</sup>

Y.) 430; *Hopson v. Doolittle*, 13 Conn. 236. The stipulation should fix the number of arbitrators and the mode of their selection. *Greiss v. State Inv. & Insurance Co.*, 98 Cal. 241, 33 Pac. 195; *Keiser v. Berks County*, 253 Pa. 167, 97 Atl. 1067.

<sup>68</sup> See *Russ. Arb.* 53; *Walters v. Morgan*, 2 Cox, Ch. 369; *Ballance v. Underhill*, 3 Scam. (Ill.) 453; *Stone v. Atwood*, 28 Ill. 30. From the fact of submission, the law always implies an agreement to abide by the award. *Valentine v. Valentine*, 2 Barb. Ch. (N. Y.) 430.

<sup>69</sup> *Morse, Arb.* 51. And see, generally, *Thomasson v. Risk*, 11 Bush (Ky.) 619; *Smith v. Douglass*, 16 Ill. 34; *Martin v. Chapman*, 1 Ala. 278; *Philbrick v. Preble*, 18 Me. 255, 36 Am. Dec. 718; *Stark's Heirs v. Cannady*, 3 Litt. (Ky.) 399, 14 Am. Dec. 76; *Phelps v. Dolan*, 75 Ill. 90; *Logsdon v. Roberts' Ex'rs*, 3 T. B. Mon. (Ky.) 255; *Byrd v. Odem*, 9 Ala. 755; *Dilks v. Hammond*, 86 Ind. 563; *Donnell v. Lee*, 58 Mo. App. 288; *McMullen v. Mayo*, 8 Smedes & M. (Miss.) 298. The submission of a pending suit may be by parol. *Wells v. Lain*, 15 Wend. (N. Y.) 99; *Brown v. Mize*, 119 Ala. 10, 24 South. 454; *Hewitt v. Lehigh & H. R. R. Co.*, 57 N. J. Eq. 511, 42 Atl. 325; *Johnsen v. Wineman*, 34 N. D. 116, 157 N. W. 679; *District of Columbia v. Bailey*, 171 U. S. 161, 18 Sup. Ct. 868, 43 L. Ed. 118.

<sup>70</sup> *Morse, Arb.* 55; *Miller v. Graham*, 1 Brev. (S. C.) 448; *Stark's Heirs v. Cannady*, 3 Litt. (Ky.) 399, 14 Am. Dec. 76; *Hodges v. Saunders*, 17 Pick. 470.

<sup>71</sup> *Peabody v. Rice*, 113 Mass. 31.

<sup>72</sup> *Davy v. Faw*, 7 Cranch, 172, 3 L. Ed. 305; *Weston v. Stuart*, 11 Me. 326.

<sup>73</sup> *Carson v. Earlywine*, 14 Ind. 256.

<sup>74</sup> A general submission of "all matters in dispute" between the parties will embrace questions relating both to real and to personal property. *Munro v. Alaïre*, 2 Caines (N. Y.) 320; *Sellick v. Addams*, 15 Johns. (N. Y.) 197. And involves a submission of both the law and the facts. *Indiana Cent. R. Co. v. Bradley*, 7 Ind. 49; *Plank v. Mizell* (Pa. Com. Pl.) 11 Pa. Co. Ct. 670.

<sup>75</sup> *Symonds v. Mayo*, 10 Cush. (Mass.) 39.

<sup>76</sup> *Loring v. Alden*, 3 Metc. (Mass.) 576.

*Statutory Submissions*

While there is a tendency towards a liberal construction, in many particulars, of statutes governing arbitrations,<sup>77</sup> a statutory submission, so far as concerns its form and execution, must, as a rule, conform strictly to the terms of the statute. Such submissions are generally required to be in writing, sometimes under seal, and acknowledged before a justice of the peace or other officer. The statute usually provides for giving effect to the award by entry of judgment upon it; and it is said that the jurisdiction of the arbitrators to make an award upon which the court can render judgment is "a special jurisdiction, created entirely by the statute," and can be sustained only by a full compliance with the statutory provisions.<sup>78</sup> But statutes authorizing and regulating submissions, and prescribing the mode by which the award may become the foundation of a judgment and enforceable as such, generally do not abrogate the common-law practice of arbitration.<sup>79</sup> The parties may generally select, at their option, either the statutory or the common-law mode; and if the submission, proceedings, and award are sufficient when tested by the rules of the common law, although not in conformity with the statute, the award will be given effect as a common-law award.<sup>80</sup> But where it clearly appears that a statutory arbitration was intended, the submission and proceedings will generally be judged by the statute; and any substantial departure from its positive requirements will be fatal to the validity of the award.<sup>81</sup>

<sup>77</sup> See Morse, Arb. 47, and cases there cited.

<sup>78</sup> Abbott v. Dexter, 6 Cush. 108; Francis v. Ames, 14 Ind. 251; Weinz v. Dopler, 17 Ill. 111; Moody v. Nelson, 60 Ill. 229; Gibson v. Burrows, 41 Mich. 713, 3 N. W. 200; Johnsen v. Wineman, *supra*; Concrete Steel & Tile Construction Co. v. Green, 65 Misc. Rep. 210, 121 N. Y. Supp. 237.

<sup>79</sup> Martin v. Chapman, 1 Ala. 278; Byrd v. Odem, 9 Ala. 755; Carson v. Earlywine, 14 Ind. 256; Titus v. Scantling, 4 Blackf. (Ind.) 89; Torrance v. Amsden, 3 McLean, 509, Fed. Cas. No. 14,103; Overly's Ex'r v. Overly's Devisees, 1 Metc. (Ky.) 117; Brown v. Kincaid, Wright (Ohio) 37; Howard v. Sexton, 4 N. Y. 157; Pierce v. Kirby, 21 Wis. 125; Peachy v. Ritchie, 4 Cal. 205; Giles L. & L. Printing Co. v. Recamier Manuf'g Co., 14 Daly (N. Y.) 475; Johnsen v. Wineman, *supra*.

<sup>80</sup> Weinz v. Dopler, 17 Ill. 111; Cook v. Schroeder, 55 Ill. 530; Eisenmeyer v. Sauter, 77 Ill. 515; Titus v. Scantling, 4 Blackf. (Ind.) 89; Moore v. Barnett, 17 Ind. 349; Clement v. Comstock, 2 Mich. 359; McGunn v. Hanlin, 29 Mich. 476; Galloway v. Gibson, 51 Mich. 135, 16 N. W. 310; Willingham v. Harrell, 36 Ala. 583; Tyler v. Dyer, 13 Me. 41; Fink v. Fink, 8 Iowa, 312; Conger v. Dean, 3 Iowa, 463, 66 Am. Dec. 93; Dockery v. Randolph (Tex. Civ. App.) 30 S. W. 270; Wilkes v. Cotter, 28 Ark. 519.

<sup>81</sup> Holdridge v. Stowell, 39 Minn. 360, 40 N. W. 259; Wesson v. Newton, 10 Cush. (Mass.) 114; Deerfield, Inhabitants of, v. Arms, 20 Pick. (Mass.) 480, 32 Am. Dec. 228; Hamilton v. Hamilton, 27 Ill. 158; Winne v. Elderkin, 1 Chand.

## REVOCATION

6. Either party may revoke the submission at any time before the award is made. The revocation may be—
- (a) Express, either oral or written, as corresponds to the submission; or
  - (b) Implied from circumstances, or the acts or condition of the parties.

*Express Revocation*

Unless denied by statute, the right of express revocation exists generally as to all submissions<sup>82</sup> except such as have actually been made a rule of court;<sup>83</sup> and it cannot be defeated by a stipulation in the submission that it shall be irrevocable.<sup>84</sup> Whether the agreement to

(Wis.) 219, 52 Am. Dec. 159; Cope v. Gilbert, 4 Denio (N. Y.) 347; *Estep v. Larsh*, 16 Ind. 82; *Bowes v. French*, 11 Me. 182; *Pierce v. Kirby*, 21 Wis. 125; *Francis v. Ames*, 14 Ind. 251; *Thompson v. Seay* (Tex. Civ. App.) 26 S. W. 895; *Abbott v. Dexter*, 6 Cush. (Mass.) 108; *Allen v. Chase*, 3 Wis. 249; *Conger v. Dean*, 3 Iowa, 463, 66 Am. Dec. 93; *Erie Telegraph & Telephone Co. v. Bent* (C. C.) 39 Fed. 409. The statute must be complied with as to the number of arbitrators. *Chickering-Chase Bros. Co. v. De Voll*, 55 Ill. App. 442.

<sup>82</sup> *Milne v. Gratrix*, 7 East, 608; *Vynior's Case*, 8 Coke, 80a; *Leonard v. House*, 15 Ga. 473; *Allen v. Watson*, 16 Johns. (N. Y.) 205; *Aspinwall v. Tousey*, 2 Tyler (Vt.) 328; *Jones v. Harris*, 59 Miss. 214; *Marsh v. Packer*, 20 Vt. 198; *Erie, Borough of, v. Tracy*, 2 Grant Cas. (Pa.) 20; *Johnson v. Andress*, 5 Phila. (Pa.) 8; *Peters' Adm'r v. Craig*, 6 Dana (Ky.) 307; *Tobey v. Bristol, County of*, 3 Story, 800, Fed. Cas. No. 14,065; *Bank of Monroe v. Widner*, 11 Paige (N. Y.) 529, 43 Am. Dec. 768; *Donnell v. Lee*, 58 Mo. App. 288; *Oregon & W. Mortg. Sav. Bank v. American Mortg. Co.* (C. C.) 35 Fed. 22; *Thomas W. Finucane Co. v. Board of Education of City of Rochester*, 190 N. Y. 76, 82 N. E. 737; *Dickie Mfg. Co. v. Sound Construction & Engineering Co.*, 92 Wash. 316, 159 Pac. 129.

For criticisms of this rule, see *Mills v. Bayley*, 2 H. & C. 36; *Northampton Gas Light Co. v. Parmle*, 15 C. B. 630. And see *Toledo S. S. Co. v. Zenith Transp. Co.*, 184 Fed. 391, 106 C. C. A. 501; *Parsons v. Ambros*, 121 Ga. 98, 48 S. E. 696; *Riley v. Jarvis*, 43 W. Va. 43, 26 S. E. 366.

<sup>83</sup> *Dexter v. Young*, 40 N. H. 130; *Huston v. Clark*, 12 Phila. (Pa.) 383; *Haskell v. Whitney*, 12 Mass. 47; *Tyson v. Robinson*, 25 N. C. 333; *Pollock v. Hall*, 4 Dall. 222, 1 L. Ed. 809; *Sutton v. Tyrrell*, 10 Vt. 91; *Bray v. English*, 1 Conn. 498; *Masterson v. Kidwell*, 2 Cranch C. C. 670, Fed. Cas. No. 9,269. Compare *Green v. Pole*, 6 Bing. 443; *Bank of Monroe v. Widner*, 11 Paige (N. Y.) 529, 43 Am. Dec. 768.

<sup>84</sup> See cases cited in note 82. Also, *Davis v. Maxwell*, 27 Ga. 368; *Power v. Power*, 7 Watts (Pa.) 205; *Shroyer v. Bash*, 57 Ind. 349. A stipulation in the submission that if either party fails to appear the arbitrators may proceed ex parte, does not render the submission irrevocable. *Boston & L. R. Corp. v. Nashua & L. R. Corp.*, 139 Mass. 463, 31 N. E. 751.

In Pennsylvania submission irrevocable, if for valuable consideration. *Frederick v. Margwarth*, 221 Pa. 418, 70 Atl. 797, 18 L. R. A. (N. S.) 1246.

submit be under seal or by parol, the right to revoke is the same; but the revocation must be of at least equal dignity with the submission. If the submission be in writing, the revocation must also be in writing;<sup>85</sup> if under seal, it can be revoked only by a sealed instrument.<sup>86</sup> As the submission is in every sense a contract, of course the party revoking it thereby renders himself liable to the other for resulting damages.<sup>87</sup> The right of revocation ceases upon the making and publishing of the award.<sup>88</sup> In case of statutory submissions, the exercise of the power of revocation is limited and controlled by the statute.<sup>89</sup> The revocation must be absolute and unconditional,<sup>90</sup> and it will not become operative until notice thereof is given to the arbitrators.<sup>91</sup> No specific form of words is required. Any words which, when liberally construed, disclose an intention to revoke the power of the arbitrators, will be held sufficient.<sup>92</sup>

### *Implied Revocation*

A revocation results by implication or operation of law from any act or circumstance which renders the continuance of the proceedings legally or actually impossible.<sup>93</sup> Thus, unless the submission provides against such a contingency, the death of an arbitrator,<sup>94</sup> or of a party,<sup>95</sup> or the refusal of an arbitrator to proceed,<sup>96</sup> or the

<sup>85</sup> Sutton v. Tyrrell, 10 Vt. 91.

<sup>86</sup> Wallis v. Carpenter, 13 Allen (Mass.) 19; McFarlane v. Cushman, 21 Wis. 401; Brown v. Leavitt, 26 Me. 251; Mullins v. Arnold, 4 Sneed (Tenn.) 262; Howard v. Cooper, 1 Hill (N. Y.) 44; Van Antwerp v. Stewart, 8 Johns. (N. Y.) 125. Sealed revocation not required in New York. Code Civ. Proc. § 2383.

<sup>87</sup> Brown v. Leavitt, 26 Me. 251; Rison v. Moon, 91 Va. 384, 22 S. E. 165; Hawley v. Hodge, 7 Vt. 237; Dexter v. Young, 40 N. H. 130; Craftsbury, Town of, v. Hill, 28 Vt. 763; Miller v. President, etc., of Junction Canal Co., 53 Barb. (N. Y.) 590; Pond v. Harris, 113 Mass. 114; Frets v. Frets, 1 Cow. (N. Y.) 335.

<sup>88</sup> Macarthur v. Campbell, 5 Barn. & Adol. 518; Knowlton v. Homer, 30 Me. 552; Clement v. Hadlock, 13 N. H. 185; Coon v. Allen, 156 Mass. 113, 30 N. E. 83; Hunt v. Wilson, 6 N. H. 36; Tobey v. Bristol, County of, 3 Story, 800, Fed. Cas. No. 14,065; Musselbrook v. Dunkin, 9 Bing. 605. See Bank of Monroe v. Widner, 11 Paige (N. Y.) 529, 43 Am. Dec. 768.

<sup>89</sup> See Bloomer v. Sherman, 5 Paige (N. Y.) 575; Carey v. Montgomery County Commissioners, 19 Ohio, 245; Shroyer v. Bash, 57 Ind. 349.

<sup>90</sup> Goodwine v. Miller, 32 Ind. 419; Steere v. Brownell, 113 Ill. 415.

<sup>91</sup> Allen v. Watson, 16 Johns. (N. Y.) 205; Brown v. Leavitt, 26 Me. 251.

<sup>92</sup> Frets v. Frets, 1 Cow. (N. Y.) 335.

<sup>93</sup> Williams v. Branning Mfg. Co., 153 N. C. 7, 68 S. E. 902, 31 L. R. A. (N. S.) 679, 138 Am. St. Rep. 637, 21 Ann. Cas. 954; Aktieselskabet Korn-Og Foderstof Kompagniet v. Rederiaktiebolaget (D. C.) 232 Fed. 403.

<sup>94</sup> Sutton v. Tyrrell, 10 Vt. 91; Potter v. Sterrett, 24 Pa. 411.

<sup>95</sup> Bailey v. Stewart, 3 Watts & S. (Pa.) 560, 39 Am. Dec. 50; Power v. Pow-

<sup>96</sup> Donnell v. Lee, 58 Mo. App. 283; Relyea v. Ramsay, 2 Wend. (N. Y.) 602; Wilson v. Cross, 7 Watts (Pa.) 495; Crawshaw v. Collins, 3 Swanst. 90; Chapman v. Seccomb, 36 Me. 102.

marriage of a female party where such marriage destroys her control over the subject-matter of the submission,<sup>97</sup> or the bringing of a suit on the disputed matter pending the arbitration,<sup>98</sup> will amount to a revocation. But the bankruptcy of a party does not have that effect,<sup>99</sup> nor does the death of a party where the submission has been made a rule of court.<sup>1</sup>

## PROCEEDINGS

7. The mode of conducting the reference is left largely to the discretion of the arbitrators, subject to the requirement that all proceedings shall be fair and just to both parties. The following are essential features:
  - (a) Notice of the meetings of the arbitrators for the hearing of evidence must be given to each party, unless waived.
  - (b) Each party must be given an opportunity to present evidence and argument in support of his own case, and to be present when his opponent is heard.
  - (c) All competent and material evidence offered by either party should be heard; but it is for the arbitrators to determine its competency or materiality.
  - (d) The arbitrators must act jointly and in person at every stage of the proceedings, unless otherwise provided by the submission.
  - (e) All proceedings must end with the making of the award.

er, 7 Watts (Pa.) 205; Gregory v. Boston Safe Deposit & Trust Co. (C. C.) 36 Fed. 408; Tyler v. Jones, 3 Barn. & C. 144; Tyson v. Robinson, 3 Ired. (N. C.) 333; Whitfield v. Whitfield, 30 N. C. 163, 47 Am. Dec. 350; Marseilles v. Kenton's Ex'rs, 17 Pa. 238. See Freeborn v. Denman, 8 N. J. Law, 116. Where a trustee of an express trust for the management of real estate takes out a policy of insurance, and agrees to submit the amount of loss to arbitration, the submission is not revoked by his death before award. Citizens' Ins. Co. of Evansville v. Coit, 12 Ind. App. 161, 39 N. E. 766.

<sup>97</sup> Com. Dig. "Arbitrament," D, 5; Charnley v. Winstanley, 5 East, 266; Sutton v. Tyrrell, 10 Vt. 91; Abbott v. Keith, 11 Vt. 525.

<sup>98</sup> Peters' Adm'r v. Craig, 6 Dana (Ky.) 307; Paulsen v. Manske, 24 Ill. App. 95; Kimball v. Gilman, 60 N. H. 54. But see Sutton v. Tyrrell, 10 Vt. 91; Needy v. German-American Ins. Co., 197 Pa. 460, 47 Atl. 739. Contra: Knaus v. Jenkins, 40 N. J. Law, 288, 29 Am. Rep. 237; N. Y. Lumber & Wood-Working Co. v. Schnieder, 15 Daly (N. Y.) 15, 1 N. Y. Supp. 441, affirmed 119 N. Y. 475, 24 N. E. 4.

<sup>99</sup> Andrews v. Palmer, 4 Barn. & Ald. 250; Snook v. Hellyer, 2 Chit. 43.

<sup>1</sup> Bacon v. Crandon, 15 Pick. (Mass.) 79; Freeborn v. Denman, 8 N. J. Law, 116; Moore v. Webb, 6 Heisk. (Tenn.) 301. See, also, Bash v. Christian, 77 Ind. 290.

As to the proceedings generally in a common-law arbitration the law prescribes no formality. If the investigation is conducted fully, fairly, and without prejudice, the arbitrator may select his own method. The essential features of the proceedings as above outlined need but little explanation. A hearing is indispensable unless waived, and an award made from the arbitrators' personal knowledge or ex parte investigation of the case is void.<sup>2</sup> Each party is entitled to notice of the time and place of the hearing; and omission to give it, if not waived,<sup>3</sup> is fatal to the award.<sup>4</sup> But notice need not be given of meetings of the arbitrators other than those for the hearing of evidence.<sup>5</sup> The hearing must be in the presence of both parties unless this right is waived.<sup>6</sup> The examination of a witness in the absence of a party, and without his knowledge and consent, or the reception of information from one of the parties in the absence of the other,<sup>7</sup> is such an irregularity as will invalidate the proceedings.<sup>8</sup> As to the

<sup>2</sup> *Billings v. Billings*, 110 Mass. 225; *Wiberly v. Matthews*, 91 N. Y. 648; *Hartford Fire Ins. Co. v. Bonner Mercantile Co.* (C. C.) 44 Fed. 151, 11 L. R. A. 623. Waiver of hearing will not be presumed. It must be shown by unequivocal proof. *Alexander v. Cunningham*, 111 Ill. 511; *Crystal Ice & Cold Storage Co. v. Elmer*, 82 N. J. Eq. 486, 89 Atl. 247.

<sup>3</sup> *Newton v. West*, 3 Metc. (Ky.) 24; *Whitlock v. Redford*, 82 Ky. 390; *Kankakee & S. W. R. Co. v. Alfred*, 3 Ill. App. 511; *Shockey's Adm'r v. Glasford*, 6 Dana (Ky.) 9; *Madison Ins. Co. v. Griffin*, 3 Ind. 277; *Kane v. City of Fond du Lac*, 40 Wis. 495; *Pike v. Stallings*, 71 Ga. 860. And a waiver of notice will not be readily presumed from the conduct of the parties, especially when there is evidence which prevents the court from indulging presumptions wholly in favor of the award. *Warren v. Tinsley*, 3 C. C. A. 613, 53 Fed. 639.

<sup>4</sup> *Elmendorf v. Harris*, 23 Wend. 628, 35 Am. Dec. 587; *Grimes v. Brown*, 113 N. C. 154, 18 S. E. 87; *Small v. Courtney*, 1 Brev. (S. C.) 205; *Thornton v. Chapman*, 2 Cranch, C. C. 244, Fed. Cas. No. 13,997; *Walker v. Walker*, 28 Ga. 140; *Falconer v. Montgomery*, 4 Dall. 232, 1 L. Ed. 813; *Ingraham v. Whitmore*, 75 Ill. 24; *Rigden v. Martin*, 6 Har. & J. (Md.) 403. Notice must be given, even though the submission is silent as to notice. *Shively v. Knoblock*, 8 Ind. App. 433, 35 N. E. 1028. But where a party, knowing that the referee, without giving notice to him, has made an ex parte investigation of the case, allows the hearing to proceed without objection, he thereby waives the irregularity. *Duckworth v. Diggles*, 139 Mass. 51, 29 N. E. 221. See, also, *Fox v. Hazelton*, 10 Pick. (Mass.) 275. And fixing, in the presence of the parties, a time for the hearing, is sufficient notice, if the hearing is had at the time so fixed. *Box v. Costello*, 6 Misc. Rep. 415, 27 N. Y. Supp. 293.

<sup>5</sup> *Miller v. Kennedy*, 3 Rand. (Va.) 2; *Zell v. Johnston*, 76 N. C. 302.

<sup>6</sup> *Falconer v. Montgomery*, 4 Dall. 232, 1 L. Ed. 813; *Citizens' Ins. Co., of Pittsburg v. Hamilton*, 48 Ill. App. 593.

<sup>7</sup> *In re Gregson*, 10 Coke, 408.

<sup>8</sup> *Ingraham v. Whitmore*, 75 Ill. 24; *Elmendorf v. Harris*, 23 Wend. (N. Y.) 628, 35 Am. Dec. 587; *Lutz v. Linthicum*, 8 Pet. 178, 8 L. Ed. 904; *Hagner v. Musgrove*, 1 Dall. 83, 1 L. Ed. 46; *Chaplin v. Kirwan*, 1 Dall. 204; *Mullins v. Arnold*, 4 Sneed (Tenn.) 262; *McKinney v. Page*, 32 Me. 513. But it is no objection that the arbitrators took advice relative to the questions before them,



reception of evidence, the arbitrator is not bound by the strict rules of law.\* He may examine witnesses interested in the event of the suit, and who would be incompetent in a court of law.<sup>9</sup> He is the sole judge of the admissibility of the evidence offered,<sup>10</sup> and his decision is final. But where it appears that the exclusion of evidence is not the result of the arbitrator's judgment upon its admissibility, but of a mistake as to the scope of the submission, it then becomes such a mistake of fact as will form a ground of impeaching the award.<sup>11</sup> The mode of examining witnesses is left to his discretion. It is no ground for setting aside the award that the witnesses were not sworn; and especially where no objection is interposed by the parties at the time.<sup>12</sup> Neither is it necessary that the arbitrators be sworn, unless this is demanded by the parties, or required by the terms of the submission or by statute.<sup>13</sup> Unless the submission provides otherwise, the arbitrators must act together at every step in the proceedings. Each must be present at every meeting, and must hear all the evidence;<sup>14</sup> and this is essential although it be stipulated that a majority may make the award.<sup>15</sup> But it is held that in the latter case, if one of the arbitrators refuse to act, the others have power to make a valid award.<sup>16</sup> Each arbitrator must act in person. He can-

if they decided on their own judgment: *Simons v. Mills*, 80 Cal. 118, 22 Pac. 25.

<sup>9</sup> *Fuller v. Wheelock*, 10 Pick. (Mass.) 135; *Maynard v. Frederick*, 7 Cush. (Mass.) 247.

<sup>10</sup> *Boston Water-Power Co. v. Gray*, 6 Metc. (Mass.) 131; *Fuller v. Wheelock*, 10 Pick. (Mass.) 135; *Hooper v. Taylor*, 39 Me. 224; *Campbell v. Western*, 3 Page (N. Y.) 124; *Pike v. Gage*, 29 N. H. 461. And see *Halstead v. Seaman*, 52 How. Prac. (N. Y.) 415.

<sup>11</sup> *Van Cortlandt v. Underhill*, 17 Johns. (N. Y.) 405, and cases in preceding note. Where parties are selected as arbitrators because of their special knowledge of the matter in controversy, and it is apparent that the parties intended to rely on that knowledge, the arbitrators may be justified in refusing to hear evidence. *Hall v. Norwalk Fire Ins. Co.*, 57 Conn. 105, 17 Atl. 356.

<sup>12</sup> *Hall v. Lawrence*, 4 Term R. 589; *Maynard v. Frederick*, 7 Cush. (Mass.) 247; *Fox v. Hazelton*, 10 Pick. (Mass.) 275; *Patten v. Hunnewell*, 8 Greenl. (Me.) 19; *Woodrow v. O'Conner*, 28 Vt. 776; *Greer v. Canfield*, 38 Neb. 169, 56 N. W. 883; *Terry v. Moore*, 3 Misc. Rep. 285, 22 N. Y. Supp. 785; *Cochran v. Bartle*, 91 Mo. 636, 3 S. W. 854.

<sup>13</sup> *Kankakee & S. W. R. Co. v. Alfred*, 3 Ill. App. 511; *Katt v. Germania Life Ins. Co.*, 26 Hun (N. Y.) 429; *Payne v. Crawford* (Ala.) 10 South. 911.

<sup>14</sup> *Taylor v. Vessel Owners' Towing Co.*, 25 Ill. App. 503; *Id.*, 126 Ill. 250, 18 N. E. 663; *Thompson v. Mitchell*, 35 Me. 281; *Carpenter v. Wood*, 1 Metc. (Mass.) 409; *Smith v. Smith*, 28 Ill. 56; *Maynard v. Frederick*, 7 Cush. 247; *Harris v. Norton*, 7 Wend. 534.

<sup>15</sup> *Kent v. French*, 76 Iowa, 187, 40 N. W. 713; *Doherty v. Doherty*, 148 Mass. 367, 19 N. E. 352.

<sup>16</sup> *Kile v. Chapin*, 9 Ind. 150.

not delegate his authority without consent of all the parties to the submission.<sup>17</sup> As the authority of the arbitrators ends with the making and publication of the award, any proceedings thereafter are a nullity. They have then no power to hear further evidence, reconsider any decided point, or even to change the award for the purpose of correcting a material error.<sup>18</sup>

## AWARD

8. The award is the expressed decision of the arbitrators on the questions submitted. To be valid, it must be—

- (a) Co-extensive with the submission.
- (b) Certain to a common intent.
- (c) Possible and reasonable.
- (d) Final and conclusive.

The term "award" is used to designate the decision of the arbitrators without regard to the form in which it is expressed; it is also used in a more specific sense as referring to the instrument containing that decision when put into writing.<sup>19</sup> Generally, a parol award will be valid<sup>20</sup> even though the submission be in writing,<sup>21</sup> unless, by reason of statutory provisions the terms of the submission, or the

<sup>17</sup> Morse, Arb. 166; Russ. Arb. 198; Wright v. Meyer (Tex. Civ. App.) 25 S. W. 1122.

<sup>18</sup> Bayne v. Morris, 1 Wall. 97, 17 L. Ed. 495; Dudley v. Thomas, 23 Cal. 365; Talbott v. Hartley, 1 Cranch C. C. 31, Fed. Cas. No. 13,732; Lansdale v. Kendall, 4 Dana (Ky.) 613; Butler v. Boyles, 10 Humph. (Tenn.) 155, 51 Am. Dec. 697; Aldrich v. Jessiman, 8 N. H. 516; Thompson v. Mitchell, 35 Me. 281; Woodbury v. Northy, 3 Greenl. (Me.) 85, 14 Am. Dec. 214; Doke v. James, 4 N. Y. 568; Patton v. Baird, 42 N. C. 255; Rogers v. Corrothers, 26 W. Va. 238; Herbst v. Hagenauers, 137 N. Y. 290, 33 N. E. 315; Flannery v. Sahagian, 134 N. Y. 85, 31 N. E. 319. But a mere clerical error of omission, not affecting the merits, may be corrected after delivery. Goodell v. Raymond, 27 Vt. 241. An award made according to the terms of the submission is not rendered invalid by a supplemental award which is not within the terms of the submission. Eddy's Ex'r v. Northup (Ky.) 23 S. W. 353.

<sup>19</sup> Bouv. Inst. § 2496; Com. Dig. "Arbitrament," E; 3 Vin. Abr. 52, 372.

<sup>20</sup> Elmendorf v. Harris, 23 Wend. (N. Y.) 628, 35 Am. Dec. 587; Giles Lithographic & Liberty Printing Co. v. Recamier Manuf'g Co., 15 N. Y. St. Rep. 354; Philbrick v. Preble, 18 Me. 255, 36 Am. Dec. 718; Shelton v. Alcox, 11 Conn. 240; Smith v. Douglass, 16 Ill. 34; Gay v. Waltman, 89 Pa. 453; Jones v. Dewey, 17 N. H. 596. A parol award is not vitiated by a subsequent ineffectual attempt to reduce it to writing. Donnell v. Lee, 58 Mo. App. 288; Deal v. Thompson (Okla.) 151 Pac. 856.

<sup>21</sup> Morse, Arb. 256; White v. Fox, 29 Conn. 570; Goodell v. Raymond, 27 Vt. 241; Marsh v. Packer, 20 Vt. 198; Crabtree v. Green, 8 Ga. 8.

nature of the subject-matter, a written award is required.<sup>22</sup> But stipulations in the submission as to the form and execution of the award should control.<sup>23</sup> The language will be liberally construed;<sup>24</sup> and if it expresses a positive decision with reasonable clearness and certainty, trifling inaccuracies, insensible expressions, and lack of technical formality will be disregarded. The intention of the arbitrators is the essential element, and effect will be given to it whenever possible.<sup>25</sup>

### *Essential Features*

As the arbitrators derive all their authority from the submission, and as the obligation of the parties to abide by the award springs from their promise to that effect, expressed or implied, in that agreement,<sup>26</sup> it is apparent that the award, to be binding, must, in all essential particulars, conform to the submission. If it fails to embrace, expressly or by necessary implication, all the matters submitted and actually presented at the hearing,<sup>27</sup> it is void;<sup>28</sup> and if it includes matters not submitted it will at least be void as to them; and, unless the unauthorized part can be separated from the rest, the whole must

<sup>22</sup> Philbrick v. Preble, 18 Me. 255, 36 Am. Dec. 718; Evans v. McKinsey, Litt. Sel. Cas. (Ky.) 262; McManus v. McCulloch, 6 Watts (Pa.) 357; Darby's Lessee v. Russell, 5 Hayw. (Tenn.) 139, 9 Am. Dec. 767.

<sup>23</sup> Morse, Arb. 257; Pratt v. Hackett, 6 Johns. (N. Y.) 14; Stanton v. Henry, 11 Johns. (N. Y.) 133; Bloomer v. Sherman, 5 Paige (N. Y.) 575; Caldwell v. Dickinson, 13 Gray (Mass.) 365; Allen v. Galpin, 9 Barb. (N. Y.) 246; Newman v. La Beaume, 9 Mo. 30. But such stipulations may be waived. Tudor v. Scovell, 20 N. H. 174. An award valid in other respects is not invalid because not made under seal, though required by the submission to be so made. Mathews v. Miller, 25 W. Va. 817.

<sup>24</sup> Rixford v. Nye, 20 Vt. 132; Coxe v. Lundy, 1 N. J. Law, 255; Grier v. Grier, 1 Dall. 174, 1 L. Ed. 87; Innes v. Miller, 1 Dall. 188, 1 L. Ed. 93; Gonzales v. Deavens, 2 Yeates (Pa.) 539; Joy v. Simpson, 2 N. H. 179.

<sup>25</sup> Morse, Arb. 252; Adams v. Adams, 2 Mod. 169; McDonald v. Arnout, 14 Ill. 58; Lewis v. Burgess, 5 Gill (Md.) 129; Ross v. Watt, 16 Ill. 99; Dibblee v. Best, 11 Johns. (N. Y.) 103.

<sup>26</sup> Cald. Arb. 226, note 1. See Stone v. Atwood, 28 Ill. 30; Thatcher Implement & Mercantile Co. v. Brubaker, 193 Mo. App. 627, 187 S. W. 117.

<sup>27</sup> That the arbitrators are bound to pass upon only the matters actually presented at the hearing, see Jones v. Welwood, 71 N. Y. 208; Boston & L. R. Corp. v. Nashua & L. R. Corp., 139 Mass. 463, 31 N. E. 751; Page v. Foster, 7 N. H. 392; Ballance v. Underhill, 3 Scam. (Ill.) 453; Whetstone v. Thomas, 25 Ill. 361; Ott v. Schroepfel, 5 N. Y. 482; Warfield v. Holbrook, 20 Pick. (Mass.) 531.

<sup>28</sup> Bradford v. Bryan, Willes, 268; Wright v. Wright, 5 Cow. (N. Y.) 197; Sherfy v. Graham, 72 Ill. 158; Hewitt v. Furman, 16 Serg. & R. (Pa.) 135; Carnochan v. Christie, 11 Wheat. 446, 6 L. Ed. 516; Harker v. Hough, 7 N. J. Law, 428; Scott v. Barnes, 7 Pa. 134; Jones v. Welwood, 71 N. Y. 208; Bell v. A. MacKay (Ala.) 72 South. 83.

fall.<sup>29</sup> But in support of the award it will be presumed, until the contrary is shown, that the terms of the submission have been followed, and that all matters actually presented were determined.<sup>30</sup> That the award is co-extensive with the submission may appear by implication.<sup>31</sup> The rule measuring the scope of the award by the submission applies to persons as well as to the subject-matter; and from this it follows that the award can impose no obligation on a stranger to the submission.<sup>32</sup> But it is not rendered invalid by a reference to a stranger merely as the agent or instrument of one of the parties,<sup>33</sup> nor by a direction that one of the parties shall pay a sum of money to a stranger on account of the other,<sup>34</sup> or that one party shall discharge the other from a bond to a stranger on which others are also bound.<sup>35</sup>

<sup>29</sup> *Hamilton v. Hart*, 125 Pa. 142, 17 Atl. 226, 473; *Waters v. Bridge*, Cro. Jac. 639; *Lee v. Elkins*, 12 Mod. 587; *Hill v. Thorn*, 2 Mod. 309; *Peters v. Peirce*, 8 Mass. 399; *Culver v. Ashley*, 17 Pick. (Mass.) 98; *Lorey v. Lorey*, 1 Mo. App. Rep'r, 189; *Thrasher v. Haynes*, 2 N. H. 429; *Leslie v. Leslie*, 52 N. J. Eq. 332, 31 Atl. 724; *Sawtells v. Howard*, 104 Mich. 54, 62 N. W. 156; *Doane College v. Lanham*, 26 Neb. 421, 42 N. W. 405; *White v. Arthur*, 59 Cal. 33; *McBride v. Hagen*, 1 Wend. (N. Y.) 326; *Clement v. Durgin*, 1 Greenl. (Me.) 300; *Cox v. Jagger*, 2 Cow. (N. Y.) 638, 14 Am. Dec. 522; *Conger v. James*, 2 Swan (Tenn.) 213; *Lynch v. Nugent*, 80 Iowa, 422, 46 N. W. 61; *Philbrick v. Preble*, 18 Me. 255, 36 Am. Dec. 718; *Walker v. Merrill*, 13 Me. 173; *Hill v. Thorn*, 2 Mod. 309; *Thatcher Implement & Mercantile Co. v. Brubaker*, supra; *Thornburg v. West Penn. Rys. Co.*, 254 Pa. 246, 98 Atl. 894.

<sup>30</sup> *Sperry v. Ricker*, 4 Allen (Mass.) 17; *Call v. Ballard*, 65 Wis. 187, 26 N. W. 547; *Jones v. Welwood*, 71 N. Y. 208; *Darst v. Collier*, 86 Ill. 96; *Karthaus v. Ferrer*, 1 Pet. 222, 7 L. Ed. 121; *Harris v. Wilson*, 1 Wend. (N. Y.) 511; *Ott v. Schroepel*, 5 N. Y. 482; *Tallman v. Tallman*, 5 Cush. (Mass.) 325; *Young v. Kinney*, 48 Vt. 22; *Lamphire v. Cowan*, 39 Vt. 420; *Solomons v. McKinstry*, 13 Johns (N. Y.) 27; *Joy v. Simpson*, 2 N. H. 179; *Clement v. Comstock*, 2 Mich. 359; *Hadaway v. Kelly*, 78 Ill. 286. One who has accepted the benefits of the award is estopped to object to its validity on the ground that it did not embrace all matters submitted. *Grimmett v. Smith*, 42 Ill. App. 577. A party cannot accept the benefits of a part of the award and object to the invalidity of another part; the award is an entirety. *Thornton v. McCormick*, 75 Iowa, 285, 39 N. W. 502.

<sup>31</sup> *Rixford v. Nye*, 20 Vt. 132; *Smith v. Demarest*, 8 N. J. Law, 195; *Stickles v. Arnold*, 1 Gray (Mass.) 418; *Buckland, Inhabitants of, v. Inhabitants of Conway*, 16 Mass. 396; *Mickles v. Thayer*, 14 Allen (Mass.) 114; *Lamphire v. Cowan*, 39 Vt. 420; *Dolbier v. Wing*, 3 Greenl. (Me.) 421.

<sup>32</sup> *Com. Dig. "Arbitrament," E*, 1; *Caldw. Arb.* 228; *Bretton v. Prat*, Cro. Eliz. 758; *Adams v. Stratham*, 2 Lev. 235; *Thirshy v. Helbont*, 3 Mod. 272; *Martin v. Williams*, 13 Johns. (N. Y.) 264; *Chapman v. Champion*, 2 Day (Conn.) 101; *Wyatt v. Benson*, 23 Barb. (N. Y.) 327; *Collins v. Freas*, 77 Pa. 493.

<sup>33</sup> *Caldw. Arb.* 228; *Snook v. Hellyer*, 2 Chit. 43; *Bird v. Bird*, 1 Salk. 74.

<sup>34</sup> *Beckett v. Taylor*, 1 Mod. 9; *Bird v. Bird*, 1 Salk. 74; *Inhabitants of Boston v. Brazer*, 11 Mass. 447; *Lamphire v. Cowan*, 39 Vt. 420.

<sup>35</sup> *Bradley v. Clyston*, Cro. Car. 541.

The requirement that an award must be certain is complied with if it is so expressed that no reasonable doubt can arise upon its face as to the nature and extent of the duties imposed by it upon the parties.<sup>36</sup> It is sufficiently certain if stated in such language that an ordinary man acquainted with the subject-matter can understand it,<sup>37</sup> or if it can be rendered certain by inspection or mere calculation<sup>38</sup> or by other sufficient means provided for in the award itself.<sup>39</sup> Technical precision is not required. The fact that the award is conditional,<sup>40</sup> or in the alternative,<sup>41</sup> does not necessarily render it void for uncertainty.

The thing awarded to be done must also be possible.<sup>42</sup> But if it

<sup>36</sup> Russ. Arb. 286; *Ingraham v. Whitmore*, 75 Ill. 24; *Hawkins v. Colclough*, 1 Burrows, 275; *Purdy v. Delavan*, 1 Caines (N. Y.) 304; *McDonald v. Bacon*, 3 Scam. (Ill.) 431; *Waite v. Barry*, 12 Wend. (N. Y.) 377; *Akely v. Akely*, 16 Vt. 450; *Woodward v. Atwater*, 3 Iowa, 61; *Strong v. Strong*, 9 Cush. (Mass.) 560; *Perkins v. Giles*, 53 Barb. (N. Y.) 342; *Pitman v. Irby* (Mo. App.) 181 S. W. 590.

<sup>37</sup> *Butler v. Mayor, etc., of City of New York*, 1 Hill (N. Y.) 489.

<sup>38</sup> *Henrickson v. Reinback*, 33 Ill. 299; *Cochran v. Bartle*, 91 Mo. 636, 3 S. W. 854; *Butler v. Mayor, etc., of City of New York*, 1 Hill (N. Y.) 489; *Bush v. Davis*, 34 Mich. 190; *Emery v. Hitchcock*, 12 Wend. (N. Y.) 156; *White v. Jones*, 8 Serg. & R. (Pa.) 349; *Colcord v. Fletcher*, 50 Me. 398. If the award is certain, uncertainty in the reasoning which led up to it will not affect its validity. *Lamphire v. Cowan*, 39 Vt. 420.

<sup>39</sup> *Fletcher v. Webster*, 5 Allen (Mass.) 566; *Macon v. Crump*, 1 Call (Va.) 575; *Benson v. White*, 101 Mass. 48; *Waite v. Barry*, 12 Wend. (N. Y.) 377. An award which is sufficiently definite to be obligatory as a contract is sufficiently certain as an award. *Bush v. Davis*, 34 Mich. 190; *Purdy v. Delavan*, 1 Caines (N. Y.) 304; *Clement v. Comstock*, 2 Mich. 359; *Akely v. Akely*, 16 Vt. 450. An award that the defendant pay a certain sum to "the executors of A." is sufficiently certain. It may be shown that the plaintiffs are the executors. *Grier v. Grier*, 1 Dall. 173, 1 L. Ed. 87. An award that one of the parties shall have in his own right all the interest which the parties jointly had in a certain brewery is not bad for uncertainty. *Byers v. Van Deusen*, 5 Wend. (N. Y.) 268. An award of a specific sum of money, directing that the party against whom the award was rendered should give "good and sufficient security" therefor, is void for uncertainty as to the kind of security required. *Jackson v. De Long*, 9 Johns. (N. Y.) 43. An award that a certain sum "was due on the 3d of March last, with interest on the same," the date named being several months before the meeting of the referees, is bad for uncertainty. *Young v. Reuben*, 1 Dall. 119, 1 L. Ed. 63.

<sup>40</sup> 1 Steph. N. P. 118; *Furser v. Prowd*, Cro. Jac. 423; *Linfield v. Ferne*, 3 Lev. 18.

<sup>41</sup> *Lee v. Elkins*, 12 Mod. 585; *Wharton v. King*, 2 Barn. & Adol. 528; *Thornton v. Carson*, 7 Cranch, 596, 3 L. Ed. 451; *McDonald v. Arnout*, 14 Ill. 58.

<sup>42</sup> 2 Pars. Cont. 694; *Lee v. Elkins*, 12 Mod. 585.

An award directing a return of notes not impossible because notes have been hypothecated. *Robertson v. Marshall*, 155 N. C. 167, 71 S. E. 67.

is in its nature possible, a subsequent impossibility created by the party himself will not affect its validity.<sup>43</sup> The award should be reasonable;<sup>44</sup> but, since it is the decision of judges chosen by the parties, the courts will not interfere on the ground of its unreasonableness unless a strong case be made out.<sup>45</sup>

It is also essential to the validity of the award that it should make a final disposition of the questions submitted, so that they may not become the subject of future litigation.<sup>46</sup> An award is final when nothing more than mere ministerial acts remain to be done to fix the rights and obligations of the parties as to the matters included in it.<sup>47</sup> It is also said that an award must be mutual; but this seems to mean but little more than that it shall be a final settlement of the case.<sup>48</sup> An award which puts an end to the controversy, and directs mutual releases, is sufficiently mutual.<sup>49</sup> The fact that not all of the parties on one side are bound does not render it void for want of mutuality.<sup>50</sup>

#### *Entire and Divisible Awards*

The fact that a part of the award is not within the submission, or is otherwise invalid, will render the whole void only when the award is indivisible. The general tendency of courts to uphold the award has led to the establishment of the rule that where the unauthorized or invalid part is independent of the rest, and can be severed without prejudice to the rights of the parties, it may be rejected, and the re-

<sup>43</sup> Com. Dig. "Arbitrament," E, 12; 2 Pars. Cont. 694.

<sup>44</sup> Rolle, Arb. F, 1; Cald. Arb. 258; 1 Steph. N. P. 125; 2 Pars. Cont. 695.

<sup>45</sup> Wood v. Griffith, 1 Swanst. 43; Brown v. Brown, 1 Vern. 157; Waller v. King, 9 Mod. 63; Perkins v. Giles, 53 Barb. (N. Y.) 342; and authorities cited in preceding note.

<sup>46</sup> Waite v. Barry, 12 Wend. (N. Y.) 377; Ingraham v. Whitmore, 75 Ill. 24; Purdy v. Delavan, 1 Caines (N. Y.) 304; Carnochan v. Christie, 11 Wheat. 446, 6 L. Ed. 516; Leslie v. Leslie, 50 N. J. Eq. 103, 24 Atl. 319; Hicks v. Magoun, 38 App. Div. 573, 56 N. Y. Supp. 484, affirmed 167 N. Y. 540, 60 N. E. 1112.

<sup>47</sup> Colcord v. Fletcher, 50 Me. 398; Lincoln v. Whittenton Mills, 12 Metc. (Mass.) 31; Owen v. Boerum, 23 Barb. (N. Y.) 187. An award that a suit shall cease is final. Simon v. Gavil, 1 Salk. 74; Knight v. Burton, Id. 75.

<sup>48</sup> "This mutuality is nothing more than that the thing awarded to be done should be a final discharge of all future claims by the party in whose favor the award is made against the others for the causes submitted; in other words, that it shall be final." Kent, J., in Purdy v. Delavan, 1 Caines (N. Y.) 304. See, also, 2 Pars. Cont. 695.

<sup>49</sup> Munro v. Alaire, 2 Caines (N. Y.) 320; Kunckle v. Kunckle, 1 Dall. 364, 1 L. Ed. 178. And an award that one party shall pay to the other a specific sum is final without a release. Byers v. Van Deusen, 5 Wend. (N. Y.) 268.

<sup>50</sup> Harrington v. Higham, 15 Barb. (N. Y.) 524; Smith v. Van Nostrand, 5 Hill (N. Y.) 419; Strong v. Beroujon, 18 Ala. 168. The objection that a submission was not binding because some of the parties were married women and minors cannot prevail as to parties having capacity. Fortune v. Killebrew (Tex. Civ. App.) 21 S. W. 986.

maintaining valid portion enforced. But if, under the submission, the award is required to be an entirety, it must stand or fall as an entirety; and, if bad in part, it will be bad altogether.<sup>51</sup>

### SAME—IMPEACHMENT

#### 9. The award may be impeached for—

- (a) Insufficiency.
- (b) Irregularity in the proceedings.
- (c) Mistake of law or fact apparent on its face.
- (d) Misconduct of the arbitrators.
- (e) Fraud of the parties in procuring it.

It has been seen in the preceding section that if the award is insufficient—that is, lacking in any of the recognized essentials of a valid award there named—it cannot be enforced. It may also be impeached by proof of any substantial irregularity in the proceedings; such as failure to give notice of the hearing, examining witnesses in the absence of one of the parties, refusing to receive competent evidence, etc. These points also have been sufficiently noticed under the head of “Proceedings.”<sup>52</sup> Prominent among the other grounds on which an award may be impeached is a mistake of fact apparent on its face. To invalidate the award, however, the mistake must be of such a material character, and so affecting the principles on which the award is based, that, if it had been seasonably known or disclosed to the arbitrators, they would probably have come to a different decision.<sup>53</sup> In such a case the award does not express the true judgment

<sup>51</sup> *Lee v. Elkins*, 12 Mod. 585; *Eckersley v. Board*, 9 Reports, 827, [1894] 2 Q. B. 667; *Cox v. Jagger*, 2 Cow. (N. Y.) 638, 14 Am. Dec. 522; *Martin v. Williams*, 13 Johns. (N. Y.) 264; *Harrington v. Higham*, 15 Barb. (N. Y.) 524; *Stearns v. Cope*, 109 Ill. 340; *Adams' Adm'r v. Ringo*, 79 Ky. 211; *Littlefield v. Waterhouse*, 83 Me. 307, 22 Atl. 176; *Leslie v. Leslie*, 50 N. J. Eq. 103, 24 Atl. 319; *McCall v. McCall*, 36 S. C. 80, 15 S. E. 348; *Bouck v. Bouck*, 57 Minn. 490, 59 N. W. 547; and, generally, cases cited in note 29, p. 372. See *Giles v. Royal Ins. Co.*, 179 Mass. 261, 60 N. E. 786; *Koerner v. Leathe*, 149 Mo. 361, 51 S. W. 96.

<sup>52</sup> See “Proceedings,” ante, p. 367.

<sup>53</sup> *Boston Water Power Co. v. Gray*, 6 Metc. (Mass.) 131; *Bell v. Price*, 22 N. J. Law, 578; *Morris v. Ross*, 2 Hen. & M. (Va.) 408; *McKinney v. Newcomb*, 5 Cow. (N. Y.) 425; *Bridgman v. Bridgman*, 23 Mo. 272; *Herrick v. Blair*, 1 Johns. Ch. (N. Y.) 101; *Perkins v. Giles*, 53 Barb. (N. Y.) 342; *Peachy v. Ritchie*, 4 Cal. 205; *McCalmont v. Whitaker*, 3 Rawle (Pa.) 84, 23 Am. Dec. 102. One seeking to set aside an award on the ground of mistake must show that if the mistake had not occurred the award would have been different. *Gorham v. Millard*, 50 Iowa, 554; *Tank v. Rohweder*, 98 Iowa, 154, 67 N. W. 106; *White*

of the arbitrators. This same principle applies to mistakes of law in cases where the whole matter of law and fact is submitted. An erroneous assumption of what the law is, if apparent on the face of the award, may be ground for setting it aside; but, if the arbitrator has exercised his judgment as to the law, it is conclusive, though it be erroneous.<sup>54</sup> The award may also be impeached for misconduct on the part of the arbitrators which is presumably prejudicial to one of the parties.<sup>55</sup> Thus the fact that one of the arbitrators was intoxicated at the time of the hearing,<sup>56</sup> or that prior to his appointment he had formed and expressed an opinion on the case, and accepted the office of arbitrator without disclosing this fact,<sup>57</sup> or that after his appointment he conversed freely about the controversy with one who had acted as arbitrator upon a prior submission of the same matter,<sup>58</sup> is ground for setting aside his award. Fraud by the parties in obtaining the award may also render it invalid.<sup>59</sup> But in all these cases the ground of impeachment must be substantial, prejudicial to the

Star Mining Co. v. Hultberg, 220 Ill. 578, 77 N. E. 327; Sweet v. Morrison, 116 N. Y. 19, 22 N. E. 276, 15 Am. St. Rep. 376. Not for a mistake of judgment. Reager's Adm'x v. Pennsylvania Co., 169 Ky. 479, 184 S. W. 395; Kaplan v. Niagara Fire Ins. Co., 73 N. J. Law, 780, 65 Atl. 188; In re Burke, 191 N. Y. 437, 84 N. E. 405.

<sup>54</sup> Smith v. Thorndike, 8 Greenl. (Me.) 119; Boston Water Power Co. v. Gray, 6 Metc. (Mass.) 131; Halstead v. Seaman, 52 How. Prac. (N. Y.) 415; Hall v. Norwalk Fire Ins. Co., 57 Conn. 105, 17 Atl. 356; Goddard v. King, 40 Minn. 164, 41 N. W. 659; Swasey v. Laycock, 1 Handy (Ohio) 334; Jones v. Boston Mill Corp., 6 Pick. (Mass.) 148; Bell v. Price, 22 N. J. Law, 578; May v. Miller, 59 Vt. 577, 7 Atl. 818. See cases in preceding note.

<sup>55</sup> Strong v. Strong, 9 Cush. (Mass.) 561; Rand v. Redington, 13 N. H. 72, 38 Am. Dec. 475; Bash v. Christian, 77 Ind. 290. The fact that one of the arbitrators, during the hearing, remained at the house of the successful party several nights, partaking of his hospitality, and that another of them dined at an hotel at his expense, is sufficient evidence of misconduct to warrant setting aside the award. Robinson v. Shanks, 118 Ind. 125, 20 N. E. 713; but see Doherty v. Insurance Co., 224 Mass. 310, 112 N. E. 940; McLaurin v. McLaughlin, 215 Fed. 345, 131 C. C. A. 487.

<sup>56</sup> Smith v. Smith, 28 Ill. 56. See, also, White v. Robinson, 60 Ill. 499.

<sup>57</sup> Beattie v. Hilliard, 55 N. H. 428. But see Morville v. American Tract Soc., 123 Mass. 129, 25 Am. Rep. 40.

<sup>58</sup> Moshier v. Shear, 102 Ill. 169, 40 Am. Rep. 573. But the fact that one selected as an arbitrator had, five years before, expressed an opinion on the subject of dispute unfavorable to one of the parties, did not render him incompetent. Brush v. Fisher, 70 Mich. 469, 38 N. W. 446, 14 Am. St. Rep. 510.

<sup>59</sup> 2 Pars. Cont. 707; Morse, Arb. 540; Stockton Combined Harvester & Agricultural Works v. Glens Falls Insurance Co., 98 Cal. 557, 33 Pac. 633; Campbell v. Campbell, 44 App. D. C. 142; Reager's Adm'x v. Pennsylvania Co., 169 Ky. 479, 184 S. W. 395.



party urging it, and not the result of his own misconduct.<sup>60</sup> The presumptions are all in favor of its validity and conclusiveness.<sup>61</sup>

### SAME—EFFECT

10. As to all matters submitted and decided, a valid award has, in general, the force and effect of a final judgment in an action between the parties.

As soon as the award is made and published, the controverted matters become merged,<sup>62</sup> and no longer furnish ground for litigation. So long as the award remains unimpeached, suit can be maintained only for its enforcement, and not on the original cause of action. Unless the award expressly provides that it shall have a temporary effect only,<sup>63</sup> it binds the rights of the parties for all time, without the right of appeal.<sup>64</sup> It may be used in evidence,<sup>65</sup> or as a defense or bar to a subsequent suit,<sup>66</sup> or it may be enforced by an action at

<sup>60</sup> *Rogers v. Corrothers*, 26 W. Va. 238; *Thompson v. Blanchard*, 2 Iowa, 44; *Davy v. Faw*, 7 Cranch, 171, 3 L. Ed. 305; *Pomroy v. Kibbee*, 2 Root (Conn.) 92; *Tomlinson v. Hammond*, 8 Iowa, 40; *Daniels v. Willis*, 7 Minn. 374 (Gil. 295); *McKinney v. Newcomb*, 5 Cow. (N. Y.) 425; *Kimball v. Walker*, 30 Ill. 482; *Plummer v. Sanders*, 55 N. H. 23; *Stearns v. Cope*, 109 Ill. 340; *Steere v. Brownell*, 113 Ill. 415; *Karthauss v. Ferrer*, 1 Pet. 222, 7 L. Ed. 121; *Beam v. Macomber*, 33 Mich. 127. Mere irregularity without fraud will not invalidate the award. *Golder v. Mueller*, 22 Ill. App. 527.

<sup>61</sup> *Karthauss v. Ferrer*, 1 Pet. 222, 7 L. Ed. 121; *Ott v. Schroepel*, 5 N. Y. 482; *Merritt v. Merritt*, 11 Ill. 565; *Strong v. Strong*, 9 Cush. (Mass.) 560; *Young v. Kinney*, 48 Vt. 22; *Bush v. Davis*, 34 Mich. 190; *Clement v. Comstock*, 2 Mich. 359; *McDonald v. Arnout*, 14 Ill. 58; *Liverpool & London & Globe Ins. Co. v. Goehring*, 99 Pa. 13.

<sup>62</sup> *Varney v. Brewster*, 14 N. H. 49; *Tevis' Ex'r v. Tevis' Ex'r*, 4 T. B. Mon. (Ky.) 46; *Armstrong v. Masten*, 11 Johns. (N. Y.) 189; *Evans v. McKinsey*, Litt. Sel. Cas. (Ky.) 262; *Gerrish v. Ayers*, 3 Scam. (Ill.) 245; *In re Wilkins*, 169 N. Y. 494, 62 N. E. 575; *Kaplan v. Niagara Fire Ins. Co.*, 73 N. J. Law, 780, 65 Atl. 188; *Reager's Adm'x v. Pennsylvania Co.*, 169 Ky. 479, 184 S. W. 395; *Starr v. McNeall*, 253 Pa. 98, 97 Atl. 943.

<sup>63</sup> See *Russ. Arb.* 514.

<sup>64</sup> *Whitehead v. Tattersall*, 1 Adol. & E. 491; *Memphis & C. R. Co. v. Scruggs*, 50 Miss. 284; *Richardson v. Lanning*, 26 N. J. Law, 130; *Rogers v. Holden*, 13 Ill. 293; *Stevenson v. Beecher*, 1 Johns. (N. Y.) 492; *Abbott v. Keith*, 11 Vt. 525; *Miller v. Vaughan*, 1 Johns. (N. Y.) 315; *Morse v. Bishop*, 55 Vt. 231.

<sup>65</sup> *Russ. Arb.* 555; *Sybray v. White*, 1 Mees. & W. 435; *Whitehead v. Tattersall*, 1 Adol. & E. 491; *Moore v. Helms*, 74 Ala. 368.

<sup>66</sup> *Brazill v. Isham*, 12 N. Y. 9; *Jessiman v. Haverhill & F. Iron Manufactory*, 1 N. H. 68; *Owen v. Boerum*, 23 Barb. (N. Y.) 187; *Preston v. Whitcomb*, 11 Vt. 47; *Baltes v. Bass Foundry & Machine Works*, 129 Ind. 185, 28 N. E. 319; *Riley v. Hicks*, 81 Ga. 265, 7 S. E. 173.

law or in equity;<sup>67</sup> but in either case it operates only between the parties, and, as a general rule, it can neither be used by nor against a stranger.<sup>68</sup> As to questions affecting real estate, it operates by way of estoppel only; it cannot pass title.<sup>69</sup> If offered in evidence, or on motion for judgment upon it, the adverse party may usually present evidence to impeach its validity;<sup>70</sup> but until this has been successfully done it remains in all respects conclusive as between the parties.

### SAME—ENFORCEMENT

#### 11. The award may be enforced by—

- (a) Suit for specific performance.
- (b) Suit at law on the award.
- (c) Suit on the arbitration bond; or, where provided by statute, by
- (d) Entry of judgment on the award, enforceable as other judgments, by execution or attachment.

The award, itself, and not the submission, is the proper foundation of an action for the enforcement of its provisions.<sup>71</sup> If the terms of the submission require that the award shall be published, the action will not lie until after publication.<sup>72</sup> Generally, equity will enforce specific performance of the award where the thing it orders to be done is such as a court of equity would have specifically enforced had it been made the subject of a contract between the parties.<sup>73</sup> Follow-

<sup>67</sup> See "Enforcement," on this page.

<sup>68</sup> *Morse*, Arb. 519; *Russ. Arb.* 521; *Thompson v. Noel*, 1 Atk. 60.

<sup>69</sup> *Henry v. Kirwan*, 9 Ir. C. L. 459; *Smalley v. Railroad Co.*, 2 Hurl. & N. 158; *Shelton v. Alcox*, 11 Conn. 240; *Cox v. Jagger*, 2 Cow. (N. Y.) 638, 14 Am. Dec. 522; *Whitney v. Holmes*, 15 Mass. 152; *Shepard v. Ryers*, 15 Johns. (N. Y.) 497.

<sup>70</sup> *Ingram v. Milnes*, 8 East, 445; *Robertson v. Wells*, 28 Miss. 90; *Relyea v. Ramsay*, 2 Wend. (N. Y.) 602; *Hinkle v. Harris*, 34 Mo. App. 223; *Tennant v. Devine*, 24 W. Va. 387.

<sup>71</sup> *Rank v. Hill*, 2 Watts & S. (Pa.) 56, 37 Am. Dec. 483; *West v. Stanley*, 1 Hill (N. Y.) 69. See, also, *Hodsden v. Harridge*, 2 Saund. 64b; *Hoffman v. Westlecraft*, 85 N. J. Law, 485, 89 Atl. 1006; *Id.*, 79 Atl. 318; *Dickie Mfg. Co. v. Sound Construction & Engineering Co.*, 92 Wash. 316, 159 Pac. 129.

<sup>72</sup> *Varney v. Brewster*, 14 N. H. 49; *Kingsley v. Bill*, 9 Mass. 198; *Parsons v. Aldrich*, 6 N. H. 264.

<sup>73</sup> *Russ. Arb.* 563; *Walters v. Morgan*, 2 Cox, Ch. 369; *Jones v. Boston Mill Corp.*, 4 Pick. (Mass.) 507, 16 Am. Dec. 358; *Wood v. Shepherd*, 2 Pat. & H. (Va.) 442; *Burke v. Parke*, 5 W. Va. 122; *McNear v. Bailey*, 18 Me. 251; *Bal-lance v. Underhill*, 3 Scam. (Ill.) 453; *McNeil v. Magee*, 5 Mason, 244, Fed. Cas. No. 8,915; *Perkins v. Giles*, 53 Barb. (N. Y.) 342; *Caldwell v. Dickinson*, 13 Gray (Mass.) 365; *Smith v. Smith*, 4 Rand. (Va.) 95.

ing the general principles of equity, therefore, an action for specific performance will not lie where there is an adequate remedy at law,<sup>74</sup> or where the party seeking the aid of the court has not performed on his part, or by his laches or otherwise has prejudiced the rights of the other party.<sup>75</sup> The award may also be enforced by a suit at law appropriate to the nature of the submission or the thing awarded; as by an action of covenant where the submission is by deed,<sup>76</sup> or an action of debt where the award directs the payment of a sum of money,<sup>77</sup> or an action on the case where the default in performance has resulted in an injury to the property of the other party,<sup>78</sup> or an action of assumpsit generally, where the submission is not under seal.<sup>79</sup> Default in performance also gives a right of action on the arbitration bond, where one has been executed.<sup>80</sup> And generally, in the United States, in case of statutory submission, the award is made returnable into court, where judgment is entered upon it, which is enforceable in the same manner as any other judgment.<sup>81</sup> But the fact

<sup>74</sup> Russ. Arb. 563; *Walters v. Morgan*, 2 Cox, Ch. 369; *Smith v. Smith*, 4 Rand. (Va.) 95; *Cannady v. Roberts*, 41 N. C. 422; *Memphis & C. R. Co. v. Scruggs*, 50 Miss. 284; *Jones v. Boston Mill Corp.*, 4 Pick. (Mass.) 507, 16 Am. Dec. 358; *McNear v. Bailey*, 18 Me. 251; *McNeil v. Magee*, 5 Mason, 244, Fed. Cas. No. 8,915.

<sup>75</sup> Morse, Arb. 604; *McNeil v. Magee*, 5 Mason, 244, Fed. Cas. No. 8,915; *Blackett v. Bates*, 35 Law J. Ch. 324; *Eads v. Williams*, 24 Law J. Ch. 531.

<sup>76</sup> *Charnley v. Winstanley*, 5 East, 266; *Marsh v. Bulteel*, 5 Barn. & Ald. 507.

<sup>77</sup> *Winter v. White*, 3 Moore, 674; *Ferrer v. Oven*, 7 Barn. & C. 427; *Hampton v. Boyer*, Cro. Eliz. 557; *McKinstry v. Solomons*, 2 Johns. (N. Y.) 57; *Riddell v. Sutton*, 5 Bing. 200; *McNear v. Bailey*, 18 Me. 251; *Williams v. Paschall*, 4 Dall. 284, 1 L. Ed. 835; *Bean v. Farnam*, 6 Pick. (Mass.) 269; *Webb v. Zeller*, 70 Ind. 408; *Griggs v. Seeley*, 8 Ind. 264.

<sup>78</sup> *Sharpe v. Hancock*, 7 Man. & G. 354.

<sup>79</sup> Russ. Arb. 541; *Hodsdon v. Harridge*, 2 Saund. 62; *Diedrick v. Richley*, 2 Hill (N. Y.) 271; *Dowse v. Cox*, 3 Bing. 20; *Swicard v. Wilson*, 2 Mill, Const. (S. C.) 218; *Taylor v. St. Johnsbury & L. C. Railroad Co.*, 57 Vt. 106; *Bates v. Curtis*, 21 Pick. (Mass.) 247; *Taylor v. Coryell*, 12 Serg. & R. (Pa.) 243; *Bierly v. Williams*, 5 Leigh (Va.) 700.

<sup>80</sup> Morse, Arb. 574; *Yates v. Russell*, 17 Johns. (N. Y.) 461; *Davis v. Forshoe*, 34 Ala. 107; *Wilkes v. Cotter*, 28 Ark. 519; *Thorpe v. Starr*, 17 Ill. 199; *Low v. Nolte*, 15 Ill. 368; *Dickerson v. Hays*, 4 Blackf. (Ind.) 44; *Com. v. Pejepscut Proprietors*, 7 Mass. 399; *Hopkins v. Flynn*, 7 Cow. (N. Y.) 526; *Hollenback v. Fleming*, 6 Hill (N. Y.) 303; *Ebersoll v. Krug*, 3 Bin. (Pa.) 528; *In re Burke*, 191 N. Y. 437, 84 N. E. 405; *Spang v. Mattes*, 253 Pa. 101, 97 Atl. 1026.

<sup>81</sup> *Ferrer v. Oven*, 7 Barn. & C. 427; *Nolte v. Lowe*, 18 Ill. 437; *Bayne v. Morris*, 1 Wall. 97, 17 L. Ed. 495; *Thompson v. Mitchell*, 35 Me. 281; *Thompson v. Childs*, 29 N. C. 435; *Plummer v. Morrill*, 48 Me. 184; *George v. Farr*, 46 N. H. 171; *Nichols v. Rensselaer County Mut. Insurance Co.*, 22 Wend. (N. Y.) 125; *Francis v. Ames*, 14 Ind. 251; *Tompkins v. Corwin*, 9 Cow. (N. Y.) 255; *Shroyer v. Bash*, 57 Ind. 349.

that the statute has been pursued in respect to the form of the submission does not make this step imperative. Generally the party in whose favor the award is made may still elect to enforce it under the statute, or treat it as a common-law award, and enforce it by action.<sup>82</sup>

<sup>82</sup> *Dickerson v. Tyner*, 4 Blackf. (Ind.) 253; *Burnside v. Whitney*, 24 Barb. (N. Y.) 632; *Titus v. Scantling*, 4 Blackf. (Ind.) 89; *Coats v. Kiger*, 14 Ind. 179; *Diedrick v. Richley*, 2 Hill (N. Y.) 271; *Collins v. Karatopsky*, 36 Ark. 316; *Wilkes v. Cotter*, 28 Ark. 519; *Swasey v. Laycock*, 1 Handy (Ohio) 334; *Griggs v. Seeley*, 8 Ind. 264; *Mitchell v. Bush*, 7 Cow. (N. Y.) 185; *Bigelow v. Newell*, 10 Pick. (Mass.) 348. Contra in some states: 5 *Corpus Juris*, 237; *Train v. Emerson*, 144 Ga. 624, 87 S. E. 1072.

# THE STATUTE OF LIMITATIONS

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## 1. HISTORICAL

Laches may bar the right to relief in equity,<sup>1</sup> and at law a creditor's delay in asserting his claim may raise a rebuttable presumption that he has been paid;<sup>2</sup> but, aside from this, lapse of time, in the absence of express statutory provision, does not affect the rights of parties to a contract. The rights arising from a contract are of a permanent and indestructible character, unless either from the nature of the contract or from its terms it is limited in point of duration.<sup>3</sup>

But, though the rights arising from contract are of this permanent character, yet as long ago as the time of James I \* a limitation of the right to sue thereon in certain cases was effected by a provision that all

<sup>1</sup> *Eads v. Williams*, 4 De Gex, M. & G. 674; *Southcomb v. Bishop of Exeter*, 6 Hare, 213; *Hogan v. Kyle*, 7 Wash. 595, 35 Pac. 399, 38 Am. St. Rep. 910; *Rogers v. Saunders*, 16 Me. 92, 33 Am. Dec. 635.

<sup>2</sup> *Williams v. Mitchell*, 112 Mo. 300, 20 S. W. 647; *Knight v. McKinney*, 84 Me. 107, 24 Atl. 744; *Wanmaker v. Van Buskirk*, 1 N. J. Eq. 685, 23 Am. Dec. 748; *Stover v. Duren*, 3 Strob. (S. C.) 448, 51 Am. Dec. 634; *Bean v. Tonnele*, 94 N. Y. 381, 46 Am. Rep. 153.

<sup>3</sup> *Anson*, Cont. 316; *Llanelly Railway & Dock Co. v. London & N. W. Ry. Co.*, L. R. 7 H. L. 550, 567.

<sup>4</sup> 21 Jac. I, c. 16.

actions of account and on the case, other than accounts concerning the trade of merchandise between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending, or contract without specialty, and all actions of debt for arrearages of rent, should be commenced and sued within six years next after the cause of such action or suit, and not after. In consequence of uncertainty as to whether the lapse of the prescribed period merely raised a rebuttable presumption of payment, or actually closed the door to enforcement and precluded evidence of nonpayment—in other words, to use the technical terms, whether the statute was one of presumption or of repose—a later statute,<sup>5</sup> known as “Lord Tenterden’s Act,” disposed of the question by providing, in effect, that the bar of the statute might be removed by a new promise or acknowledgment in writing, and signed by the party to be charged thereby; but not otherwise. It did not deal with the effect of a part payment, nor define by whom it might be made, nor who should be bound thereby. It left that subject to be regulated by the courts.<sup>6</sup>

The modern view, however, has been that the statute was a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against stale demands after the true state of the transactions may have been forgotten, or be incapable of explanation.<sup>7</sup>

Statutory provisions, generally in terms similar to those of Lord Tenterden’s Act, have been adopted in all our states, providing that actions must be brought within a certain number of years, or be barred. Such statutes are known as the “Statutes of Limitations.” The time limited varies in the different states.

## 2. LACHES IN EQUITY

Irrespective of the operation of statutes of limitation, a court of equity will not aid a party whose application is destitute of conscience, good faith, and reasonable diligence, but will discourage stale demands, for the peace of society, by refusing to interfere where there has been gross laches in prosecuting rights, or where long acquiescence in the as-

<sup>5</sup> 9 Geo. IV, c. 14.

<sup>6</sup> *Murdock v. Waterman*, 145 N. Y. 55, 61, 62, 39 N. E. 829, 27 L. R. A. 418, Chitty, J., in *Re Hollingshead*, 37 Ch. Div. 651.

Generally deemed a statute of repose. *Quick v. Corlies*, 39 N. J. Law, 11; *Craven v. Craven*, 181 Ind. 553, 103 N. E. 333, 105 N. E. 41; *Glover v. National Bank of Commerce in New York*, 156 App. Div. 247, 141 N. Y. Supp. 409.

<sup>7</sup> *Bell v. Morrison*, 1 Pet. 351-360, 7 L. Ed. 174. See *Woods v. Irwin*, 141 Pa. 278, 295, 21 Atl. 603, 23 Am. St. Rep. 282.

sertion of adverse rights has occurred. The rule is peculiarly applicable where the difficulty of doing entire justice arises through the death of the principal participants in the transactions complained of, or of the witness or witnesses, or by reason of the original transactions having become so obscured by time as to render the ascertainment of the exact facts impossible. Each case must necessarily be governed by its own circumstances, since, though the lapse of a few years may be sufficient to defeat the action in one case, a longer period may be held requisite in another, dependent upon the situation of the parties, the extent of their knowledge or information, great changes in values, the want of probable grounds for the imputation of intentional fraud, the destruction of specific testimony, the absence of any reasonable impediment or hindrance to the assertion of the alleged rights, and the like.<sup>8</sup>

Thus, under the varying facts of given cases, the doctrine of laches has been applied to debar the complainant of relief after the lapse of seven,<sup>9</sup> five,<sup>10</sup> four,<sup>11</sup> and even two years.<sup>12</sup>

Apart from their own inherent doctrine of laches, as above stated, courts of equity, in cases where their jurisdiction is concurrent with courts of law consider themselves bound by the statutes of limitation which govern courts of law in like cases, and this rather in obedience to the statutes than by analogy.<sup>13</sup> In many other cases they act upon the analogy of the like limitation at law;<sup>14</sup> while in some jurisdictions the statute of limitations makes special provision for actions in equity,

<sup>8</sup> *Hammond v. Hopkins*, 143 U. S. 224, 250, 12 Sup. Ct. 418, 36 L. Ed. 134; *Marsh v. Whitmore*, 21 Wall. 178, 22 L. Ed. 482; *Lansdale v. Smith*, 106 U. S. 391, 1 Sup. Ct. 350, 27 L. Ed. 219; *Gallihier v. Cadwell*, 145 U. S. 368, 371, 12 Sup. Ct. 873, 36 L. Ed. 738; *Penn Mut. Life Ins. Co. v. City of Austin*, 168 U. S. 685, 696, 18 Sup. Ct. 223, 42 L. Ed. 626; *Murray v. Coster*, 20 Johns. (N. Y.) 576, 583, 11 Am. Dec. 333; *Decouche v. Savetier*, 3 Johns. Ch. (N. Y.) 190, 216, 8 Am. Dec. 478; *Hamer v. Sidway*, 124 N. Y. 538, 548-551, 27 N. E. 256, 12 L. R. A. 463, 21 Am. St. Rep. 693.

<sup>9</sup> *Brown v. Buena Vista County*, 95 U. S. 157, 24 L. Ed. 422.

<sup>10</sup> *Harwood v. Cincinnati & C. Air Line R. Co.*, 17 Wall. 78, 21 L. Ed. 558; *Davison v. Davis*, 125 U. S. 90, 8 Sup. Ct. 825, 31 L. Ed. 635.

<sup>11</sup> *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 328.

<sup>12</sup> *Hoigate v. Eaton*, 116 U. S. 33, 6 Sup. Ct. 224, 29 L. Ed. 538; *Société Foncière et Agricole des Etats Unis v. Milliken*, 135 U. S. 304, 10 Sup. Ct. 823, 34 L. Ed. 208.

<sup>13</sup> *Badger v. Badger*, 2 Wall. 87, 94, 17 L. Ed. 836; *Butler v. Johnson*, 111 N. Y. 204, 213, 18 N. E. 643; *In re Neilley*, 95 N. Y. 382, 390; *Roberts v. Ely*, 113 N. Y. 128, 133, 20 N. E. 606; *Fuller v. Morian*, 85 Misc. Rep. 529, 147 N. Y. Supp. 650; *Casper v. Kalt-Zimmers Mfg. Co.*, 159 Wis. 517, 149 N. W. 754, 150 N. W. 1101.

<sup>14</sup> *Badger v. Badger*, 2 Wall. 87, 94, 17 L. Ed. 836; *Murdock v. Waterman*, 145 N. Y. 55, 61, 39 N. E. 829, 27 L. R. A. 418; *Giles v. Baremore*, 5 Johns. Ch. (N. Y.) 545; *Adams v. Pugh's Adm'r*, 116 Va. 797, 83 S. E. 370; *Johnston*

but in such cases the statute merely fixes the time beyond which the claim shall not be prosecuted, but does not deprive courts of equity of their power of refusing relief on the ground of laches, even though the time fixed by the statute has not yet expired.<sup>15</sup> Thus, in New York, the period of limitation in equitable actions is fixed, by Code Civ. Proc. § 388, at 10 years after the cause of action accrues.<sup>16</sup>

### 3. WHAT IS A SUFFICIENT ACKNOWLEDGMENT

Prior to the passage of Lord Tenterden's Act in England, and even in cases treating the earlier statute of limitations as one of repose, it was always held that there were certain facts which might be shown to prevent a defendant from availing himself of the statute as a bar to an action against him. Thus, an acknowledgment of the debt by the debtor, after time had begun to run under the statute, was held to vitiate the effect of any lapse of time prior thereto, and set the time running anew from that date. But just what sort of an acknowledgment would suffice for that purpose was not very clear. Many cases admitted loose and general expressions of the debtor, from which a probable or possible inference might be deduced of the acknowledgment of a debt by a court or jury, so that any acknowledgment, however slight, or any statement not amounting to a denial of the debt, or any admission of the existence of an unsettled account, without any specification of amount or balance, and however indeterminate and casual, was yet sufficient to take the case out of the statute of limitations, and to let in evidence aliunde to establish any debt, however large. The English decisions upon this subject had gone great lengths, and in some instances to an extent irreconcilable with any just principles. Subsequently there was a disposition on the part of the courts to retrace their steps, and bring the doctrine back to rational limits, and it was held that, to take a case out of the statute, there must be an unqualified acknowledgment, not only of the debt as originally due, but that it continued so, and, if there had been a conditional promise that the condition had been performed.<sup>17</sup>

*Land Co. v. Mitchell*, 29 N. D. 510, 151 N. W. 23; *Pollitz v. Wabash R. Co.*, 207 N. Y. 115, 100 N. E. 721.

<sup>15</sup> *Calhoun v. Millard*, 121 N. Y. 69, 82, 24 N. E. 27, 8 L. R. A. 248; *People ex rel. Collins v. Donohue*, 70 Hun, 317, 322, 24 N. Y. Supp. 437; *Groesbeck v. Morgan*, 206 N. Y. 385, 99 N. E. 1046.

<sup>16</sup> *Mason v. Henry*, 152 N. Y. 529, 46 N. E. 837; *Gilmore v. Ham*, 142 N. Y. 1, 6, 36 N. E. 826, 40 Am. St. Rep. 554; *Exkorn v. Exkorn*, 1 App. Div. 124, 37 N. Y. Supp. 68.

<sup>17</sup> *Bell v. Morrison*, 1 Pet. 351-360, 7 L. Ed. 174; *Bangs v. Hall*, 2 Pick. (Mass.) 368, 13 Am. Dec. 437; *In re River Steamer Co.*, 6 Ch. App. 822, 828. See, also, *Biddel v. Brizzolara*, 64 Cal. 354, 30 Pac. 609; *Heany v. Schwartz*,



A doctrine quite as comprehensive was early asserted in the Supreme Court of New York,<sup>18</sup> in which it was said that "if, at the time of the acknowledgment of the existence of the debt, such acknowledgment was qualified in a way to repel the presumption of the promise to pay, it will not be evidence of a promise, sufficient to revive the debt, and take it out of the statute"; and in accord with this principle the same court held that, "if the acknowledgment be accompanied by a declaration that the party intends to rely on the statute as a defense, such an acknowledgment is wholly insufficient."<sup>19</sup>

Various courts have thus stated the requisite character of an acknowledgment: "If there be no express promise, but a promise is to be raised by implication of law from the acknowledgment of the party, such acknowledgment ought to contain an unqualified and direct admission of a present subsisting debt, which the party is liable and willing to pay."<sup>20</sup> "The acknowledgment must be clear, distinct, and unequivocal, and it must be consistent with the promise to pay."<sup>21</sup> The writing, in order to constitute an acknowledgment, must recognize an existing debt, and it should contain nothing inconsistent with the intention on the part of the debtor to pay it.<sup>22</sup> "At common law the admission removed the bar of the statute only when it was of such a nature that a promise to pay might be inferred from it."<sup>23</sup>

Under Lord Tenterden's Act (9 Geo. IV, c. 14), Code Civ. Proc. N. Y. § 395, and other statutes following the English act, the new promise or acknowledgment must be in writing, signed by the party to be charged thereby.<sup>24</sup> But oral evidence may be resorted to, as in other cases of written instruments, in aid of the interpretation. Con-

155 Pa. 154, 25 Atl. 1078; *Boynton v. Moulton*, 159 Mass. 248, 34 N. E. 361; *Cosio v. Guerra*, 67 Fla. 331, 65 South. 5; *Wenz v. Wenz*, 222 Mass. 314, 110 N. E. 969; *Pennington v. U. S.*, 231 U. S. 631, 34 Sup. Ct. 269, 58 L. Ed. 410.

<sup>18</sup> *Sands v. Gelston*, 15 Johns. 511.

<sup>19</sup> See, also, *Brown v. Campbell*, 1 Serg. & R. (Pa.) 176; *Clementson v. Williams*, 8 Cranch, 72, 3 L. Ed. 491; *Phelan v. Fitzpatrick*, 84 Wis. 240, 54 N. W. 614; *Perry v. Chesley*, 77 Me. 393; *Hussey v. Kirkman*, 95 N. C. 63; *Stafford v. Richardson*, 15 Wend. (N. Y.) 302; *Shoemaker v. Benedict*, 11 N. Y. 176, 183, 62 Am. Dec. 95.

<sup>20</sup> *Bell v. Morrison*, 1 Pet. 351, 7 L. Ed. 174; *Russell v. Davis*, 51 Minn. 482, 53 N. W. 766. Compare *Gay's Estate v. Hassom*, 64 Vt. 495, 24 Atl. 715.

<sup>21</sup> *Keener v. Zartman*, 144 Pa. 179, 22 Atl. 889; *Russell v. Davis*, 51 Minn. 482, 53 N. W. 766; *Chapman's Appeal*, 122 Pa. 331, 15 Atl. 460. Compare *Custy v. Donlan*, 159 Mass. 245, 34 N. E. 360, 38 Am. St. Rep. 419; *Boynton v. Moulton*, 159 Mass. 248, 34 N. E. 361.

<sup>22</sup> *Manchester v. Braedner*, 107 N. Y. 346-349, 14 N. E. 405, 1 Am. St. Rep. 829; *Wald v. Arnold*, 168 Mass. 134, 46 N. E. 419.

<sup>23</sup> *Henry v. Roe*, 83 Tex. 446, 18 S. W. 806, 808; *Busw. Lim.* § 42.

<sup>24</sup> See *Patterson v. Neuer*, 165 Pa. 66, 73, 30 Atl. 748.

sistently with this rule, it has been held that oral evidence is admissible to identify the debt, and its amount, or to fix the date of the writing relied upon as an acknowledgment, when the circumstances are omitted, or expressed ambiguously.<sup>25</sup>

Although, as above shown, it is sometimes said that the promise must be unconditional, this term does not exclude as insufficient an absolute promise to pay upon the happening of some contingency or the fulfillment of some condition, for when this happens, or is fulfilled, the promise then becomes absolute. In such a case, in order to take advantage of the promise, it must be shown that it has thus become operative.<sup>26</sup>

#### 4. WAIVER

The theory on which an acknowledgment or new promise takes the debt out of the statute of limitations is sometimes stated to be that it waives the bar of the statute, though it is admitted that this view, particularly when the so-called waiver is made before the period of limitation has expired, and when, accordingly, there is nothing to waive, and the liability is undeniable, is not free from difficulties.<sup>27</sup> And it is said that probably the doctrine is a relic of the time when the statute was regarded with disfavor, and evaded as far as possible.<sup>28</sup>

The term "waiver" is, however, sometimes used in another sense, as referring to a contract by the debtor with the creditor not to avail himself of the benefit of the statute, in return for an extension of time to pay, or other benefit passing from the creditor;<sup>29</sup> while sometimes the binding effect of a waiver is explained on the theory of estoppel.<sup>30</sup>

Perhaps the true theory is that the acknowledgment constitutes a new or continuing contract, based upon the past consideration.<sup>31</sup>

<sup>25</sup> *Manchester v. Braedner*, 107 N. Y. 346-349, 14 N. E. 405, 1 Am. St. Rep. 829; *Kincaid v. Archibald*, 73 N. Y. 189; *Lechmere v. Fletcher*, 3 Tyrw. 450; *Bird v. Gammon*, 3 Bing. N. C. 883; 1 Smith, Lead. Cas. 960, and cases cited.

<sup>26</sup> *Wakeman v. Sherman*, 9 N. Y. 85; *Boynton v. Moulton*, 159 Mass. 248, 34 N. E. 361; *Parker v. Butterworth*, 46 N. J. Law, 244, 50 Am. Rep. 407; *Gray v. Day*, 109 Me. 492, 84 Atl. 1073, 43 L. R. A. (N. S.) 535; *Wenz v. Wenz*, 222 Mass. 314, 110 N. E. 969; *Koop v. Cook*, 67 Or. 93, 135 Pac. 317. *Wald v. Arnold*, 168 Mass. 134, 46 N. E. 419; *Ilisley v. Jewett*, 3 Metc. (Mass.) 439, 445; *Bigelow v. Norris*, 139 Mass. 12, 29 N. E. 61.

<sup>28</sup> *Wald v. Arnold*, 168 Mass. 134, 46 N. E. 419.

<sup>29</sup> *Wetzell v. Bussard*, 11 Wheat. 309, 6 L. Ed. 481.

<sup>30</sup> *Utica Ins. Co. v. Bloodgood*, 4 Wend. (N. Y.) 652.

<sup>31</sup> See *Wood, St. of L. (4th Ed.)*, § 64; N. Y. Code Civ. Proc. N. Y. § 395; *Security Bank of New York v. Finklestein*, 160 App. Div. 315, 145 N. Y. Supp. 5. See, also, § 6, post.

## 5. WHAT IS PART PAYMENT

Lord Tenterden's Act did not deal with the effect upon the running of the time, under the statute, of a part payment. And the same proposition is true of many American statutes founded upon the English statute. Thus the New York statute, after declaring that an acknowledgment or promise in writing, signed by the party to be charged thereby, is the only competent evidence of a new or continuing contract whereby to take a case out of the operation of the provisions relating to limitations, adds that "this section does not alter the effect of a payment of principal or interest";<sup>32</sup> thus leaving the effect undefined, and to be determined by the principles established by the decisions of the courts applicable to the subject.<sup>33</sup>

Partial payments, which, as well as formal acknowledgments, may be relied upon to take a case out of the statute, are not in reality entirely distinct from acknowledgments of an existing indebtedness, but are to be regarded as mere facts from which an admission of the existence of the entire debt may be inferred. As a fact by itself, a payment only proves the existence of the debt to the amount paid; but from that fact courts and juries have inferred a promise to pay the residue. But, in any view, it is only reliable as evidence of a promise, or from which a promise may be implied. Any other evidence which establishes such a promise may, apart from the operation of any statutory requirement of a special form of acknowledgment or promise, be equally efficacious. In any case the question is as to the weight to be given to evidence, and if a new promise is satisfactorily proved—as, for example, by the fact of the partial payment—the debt is renewed, and without a promise, express or implied, it is not renewed.<sup>34</sup>

Where a partial payment is made on account of an existing indebtedness, the whole debt upon which such payment is made is thereby taken out of the statute of limitations up to that time. The payment is an acknowledgment of an existing indebtedness, and raises an implied promise at that time to pay the balance.<sup>35</sup> In order to have that ef-

<sup>32</sup> Code Civ. Proc. § 395.

<sup>33</sup> *Murdock v. Waterman*, 145 N. Y. 55, 62, 39 N. E. 829, 27 L. R. A. 418.

And see *In re Hearman's Estate* (Sur.) 19 N. Y. Supp. 539; *Wells v. Davis*, 113 N. Y. 246, 21 N. E. 68, 3 L. R. A. 394; *Cleave v. Jones*, 3 Exch. 573; *First Nat. Bank of Utica v. Ballou*, 49 N. Y. 155; *Anthony v. Fritts*, 45 N. J. Law, 1.

<sup>34</sup> *Shoemaker v. Benedict*, 11 N. Y. 176, 185, 62 Am. Dec. 95; *O'Brien v. Donnelly*, 169 App. Div. 709, 155 N. Y. Supp. 790; *Mead v. Chicago & N. W. Ry. Co.*, 189 Ill. App. 323; *Wenz v. Wenz*, 222 Mass. 314, 110 N. E. 969.

<sup>35</sup> *Day v. Mayo*, 154 Mass. 472, 28 N. E. 898; *Lang v. Gage*, 65 N. H. 173, 18 Atl. 795.

fect, it must not only appear that a payment was made on account of a debt, but also on account of *the* debt for which action is brought, and that the payment was made as part of a larger indebtedness, and under such circumstances as will warrant a jury in finding an implied promise to pay the balance.<sup>36</sup>

If it be doubtful whether a payment was a part payment of an existing debt, more being admitted to be due, or whether the payment was apparently intended by the party to satisfy the whole of the demand against him, the payment cannot operate as an admission of a debt, so as to extend the period of limitation. If there be a mere naked payment of money, without anything to show on what account or for what reason the money was paid, the payment will be of no avail under the statute.<sup>37</sup>

## 6. WHEN MUST ACKNOWLEDGMENT OR PAYMENT BE MADE

It is not necessary that an acknowledgment or partial payment, in order to take a case out of the statute of limitations, should be made before the full time fixed by the statute has elapsed. It may be made either while the time is running or after the time has fully expired. The reason is that in any case the acknowledgment or payment does not properly revive the original contract, so that an action may be maintained thereon after the statutory period of limitation has expired; but it constitutes, or is evidence of, a new promise to pay the debt, upon which new promise the action is to be brought. The consideration for such a promise, either express or implied, is to be found in the just obligation of the debtor to pay the debt. The statute does not wipe the debt out of existence after the lapse of the statutory period, but merely prohibits its enforcement by action; in other words, the statute relates merely to the remedy. The debt, therefore, thus continuing to exist, furnishes a sufficient basis for a new agreement to pay it. After the statutory period of limitation has expired, therefore, an action may be maintained upon the new promise by proof that such promise was made either before or after the statutory period had expired; and, for the same reason, as soon as the new promise is made, the statute again begins to run against it, and the action based

<sup>36</sup> *Crow v. Gleason*, 141 N. Y. 489, 493, 36 N. E. 497; *Ruhl v. Gambrill*, 175 Ill. App. 641; *J. M. Arthur & Co. v. Burke*, 83 Wash. 690, 145 Pac. 974.

<sup>37</sup> *Abb. Tr. Ev.* 824; *Harper v. Fairley*, 53 N. Y. 442; *Albro v. Figuera*, 60 N. Y. 630; *Smith v. Ryan*, 66 N. Y. 352, 23 Am. Rep. 60; *Adams v. Olin*, 140 N. Y. 150, 35 N. E. 448; *Haines' Adm'r v. Watts' Adm'r*, 53 N. J. Law, 455, 21 Atl. 1032; *Hamilton v. Coffin*, 45 Kan. 556, 26 Pac. 42; *U. S. v. Wilder*, 13 Wall. 254, 256, 20 L. Ed. 681; *In re Ballantine* (D. C.) 232 Fed. 271.

upon it must, therefore, be begun before the statutory period, with reference to such new promise, has expired. Thus, if the period of limitation is six years, and a new promise is not made until the end of the seventh year, an action may be maintained thereon within six years from the time of the making of the new promise.<sup>38</sup>

## 7. PAYMENT NEED NOT BE MADE IN MONEY

A payment, sufficient to take a case out of the statute of limitations, need not be made in the form of money. Thus, for example, where a claim arose in 1878, and in 1883-84 work was performed by the debtor for the creditor under an agreement that the amount thereof should be credited upon the account, and credits were given accordingly, such credits were held to take the case out of the operation of the statute.<sup>39</sup>

So, delivery by a debtor to a creditor, of the note of a third person as collateral to the payment of his debt, is equally significant as an acknowledgment by the debtor of his liability for the whole demand as would be a cash payment of a like amount.<sup>40</sup>

So, the delivery to the creditor of a policy of life insurance, or of the renewal certificate of such policy, as collateral security for the payment of the debt, is sufficient to constitute a renewal of the debt, and the statute will begin to run from the time of such delivery. The theory upon which the delivery of the policy saves the operation of the statute is that the debtor, by such act, acknowledges the debt, and evinces a willingness to pay.<sup>41</sup>

## 8. BY WHOM ACKNOWLEDGMENT MUST BE MADE

### *By Joint Debtor*

Much discussion has arisen, and some difference of opinion has existed, over the question of the power of one joint debtor, under certain circumstances, to bind the other by making an acknowledgment of the existence of an indebtedness. The controlling principle by which all such cases should be tested is this: That an acknowledgment, in order to deprive a debtor of his defense under the statute of limitations, must have been made by him or by his authorized agent. Thus, if such agency does in fact exist, one joint contractor may make payments as agent for all the contractors, or a principal debtor may make

<sup>38</sup> *Shoemaker v. Benedict*, 11 N. Y. 176, 62 Am. Dec. 95.

<sup>39</sup> *Lawrence v. Harrington*, 122 N. Y. 408, 25 N. E. 406; *Manson v. Lancey*, 84 Me. 380, 24 Atl. 880; *Bodger v. Arch*, 10 Exch. 333.

<sup>40</sup> *Smith v. Ryan*, 66 N. Y. 352, 23 Am. Rep. 60.

<sup>41</sup> *Miller v. Magee*, 49 Hun, 610, 2 N. Y. Supp. 156.

payments for and in the name of his surety as his agent, or payments may thus be made in the name of all the joint contractors or of the surety without previous authority, but they must be subsequently ratified; and in all such cases the running of the statute may be prevented. But in all cases, to make the payments effective, they must, by previous authorization or subsequent ratification, be the payments of the party sought to be affected by them.<sup>42</sup>

A partial payment by a stranger, or by a person not authorized to represent the debtor, offers no ground for assuming any payment on the part of the latter or for inferring a new promise by him to pay the balance of the debt; and the payment, not being made by the debtor or by his authority, cannot, therefore, arrest the running of the statute. But in the application of the doctrine that a part payment, within the statute, must be made by the debtor or by his authority, there has been much diversity of judicial opinion.<sup>43</sup>

Prior to the decision of *Van Keuren v. Parmelee*,<sup>44</sup> it was well settled that payments or acknowledgments by one of several makers of a promissory note, made before the statute of limitations had barred an action upon it, might prevent the statute of limitations from attaching to the demand, on the ground that by the joint contract there was a unity of interest by which a quasi agency was created between the contractors, so that the admission or promise of one would bind all.<sup>45</sup> And so in other states.<sup>46</sup>

The *Van Keuren Case*, *supra*, held that an acknowledgment and promise to pay, made by one partner after the dissolution of the firm, would not revive a debt against the firm, which was barred by the statute of limitations, on the theory that the dissolution of the partnership terminated the agency of each partner to bind the others. In *Shoemaker v. Benedict* <sup>47</sup> the question was presented whether the joint contract creates an agency in one of several joint debtors to continue

<sup>42</sup> *McMullen v. Rafferty*, 89 N. Y. 456, 460; *Ritzmuller v. Neuer*, 130 Ill. App. 380; *Weidenhammer v. McAdams*, 52 Ind. App. 98, 98 N. E. 883; *Myers v. Erwin*, 180 Mich. 469, 147 N. W. 458; *State Bank of West Pullman v. Pease*, 153 Wis. 9, 139 N. W. 767; *Woolf v. Gray* (Utah) 158 Pac. 788.

<sup>43</sup> *Murdock v. Waterman*, 145 N. Y. 55-63, 39 N. E. 829, 27 L. R. A. 418; *Knapp v. Crane*, 14 App. Div. 120, 43 N. Y. Supp. 513.

<sup>44</sup> 2 N. Y. 523, 51 Am. Dec. 322.

<sup>45</sup> *Whitcomb v. Whiting*, 2 Doug. 652; *Patterson v. Choate*, 7 Wend. (N. Y.) 441; *Hammon v. Huntley*, 4 Cow. (N. Y.) 493.

<sup>46</sup> *Moore v. Goodwin*, 109 N. C. 218, 13 S. E. 772; *Sigourney v. Drury*, 14 Pick. (Mass.) 387; *Perham v. Raynal*, 2 Bing. 306; *Pike v. Warren*, 15 Me. 393; *Joslyn v. Smith*, 13 Vt. 356; *Shelton v. Cocke*, 3 Munf. (Va.) 191; *Beitz v. Fuller*, 1 McCord (S. C.) 541, 10 Am. Dec. 693; *Geddes v. Simpson*, 2 Bay (S. C.) 533.

<sup>47</sup> 11 N. Y. 176, 62 Am. Dec. 95.

a debt or renew a debt already barred against all, and prevent the statute of limitations from attaching by a new promise, express or implied; or, in other words, whether such joint debtor is authorized, by virtue of his relation to the parties, to make such new contract, which shall bind them all. It was held that a new promise and a partial payment both stood on the same footing, the latter being available merely as a fact from which an admission of the existence of the entire debt and the present liability to pay may be inferred; and also that a promise, made while the statute of limitation was running, is to be construed and acted upon in the same manner as if made after the statute had attached, and that the partial payment, or an acknowledgment by one of two joint debtors, did not deprive the other of his defense that the claim was barred by the statute.<sup>48</sup>

In some states a distinction is made between those cases in which part payment is made by one of several promisors before the statute of limitations has attached and those in which a payment is made after the completion of the bar of the statute; it being held in the former that the debt or demand is kept alive as to all, and in the latter that it is revived only as to the party making the payment.<sup>49</sup> The reason assigned for this distinction is that, by withdrawing from the joint debtor the protection of the statute, he is subjected to a new liability not created by the original contract of indebtedness,<sup>50</sup> or that the implied agency terminates when the debt is barred.<sup>51</sup>

The same difficulties are presented in a great variety of cases where two or more persons are responsible for the same debt; and, in spite of some conflict, the tendency of the decisions is to hold, as in the case of joint debtors, that an acknowledgment by one, even with the knowledge of the others, does not bind them, unless they authorized him to renew the obligation on their behalf.<sup>52</sup>

#### *By an Executor or Administrator*

It is the general rule in this country that an acknowledgment of an executor or administrator does not remove the statute bar, although

<sup>48</sup> See, also, *Lewis v. Woodworth*, 2 N. Y. 512, 51 Am. Dec. 319.

<sup>49</sup> *Parker v. Butterworth*, 46 N. J. Law, 244, 251, 50 Am. Rep. 407; *Atkins v. Tredgold*, 2 Barn. & C. 23; *Moore v. Beaman*, 111 N. C. 328, 16 S. E. 177; *Sigourney v. Drury*, 14 Pick. (Mass.) 387-391; *Ellicott v. Nichols*, 7 Gill (Md.) 85, 48 Am. Dec. 546.

<sup>50</sup> *Cross v. Allen*, 141 U. S. 528-536, 12 Sup. Ct. 67, 35 L. Ed. 843.

<sup>51</sup> *Parker v. Butterworth*, supra, 46 N. J. Law, at p. 254, 50 Am. Rep. 407.

In England and some of the states the matter is regulated by statute. See *Chase's Stephen's Digest of Ev.* (2d Ed.) p. 69, note 2; *Wood, St. of L.* (4th Ed.) p. 571.

<sup>52</sup> *Security Bank of New York v. Finklestein*, 160 App. Div. 315, 145 N. Y. Supp. 5; *Fitzgerald v. Flannagan* (Iowa) 125 N. W. 995.

it may suspend the running of the statute if made before the bar is complete.<sup>53</sup> But in England<sup>54</sup> and some of the states the rule is otherwise.<sup>55</sup>

## 9. TO WHOM ACKNOWLEDGMENT MUST BE MADE

In order to take a case out of the operation of the statute, an acknowledgment must be made to the creditor, or his agent, or some one acting in his behalf, or at least must be intended to be communicated to him, or to influence his conduct.<sup>56</sup> Thus, apart from other objections, the fact that an admission or acknowledgment of an indebtedness is made by the debtor in an answer interposed by him in an action to which the creditor is not a party would not suffice to rebut the presumption of payment, or to revive a debt barred by the statute.<sup>57</sup>

## 10. APPLICATION OF PAYMENTS

Having regard to the theory that a part payment tolls the statute, because it implies a new promise to pay the balance of the debt, it would seem, when there are two or more debts, that the effect of the part payment would depend, as in other cases of contract, merely upon the indicated or reasonably presumable intention of the party making the payment. If he gives the creditor to understand that he pays generally—that is, with reference to all the debts—then he renews them all.<sup>58</sup> But, while most of the decisions are not inconsistent with this view, the dicta are often contrary and are much confused.<sup>59</sup>

The matter is usually discussed under the head of application of payments, and it is said that, when a payment is made generally, the creditor may apply it as he pleases, and, if the creditor does not ap-

<sup>53</sup> Schouler, *Wills, Ex'rs & Adm'rs*, vol. 2, § 1389, and cases cited; *Hamlin v. Smith*, 72 App. Div. 601, 76 N. Y. Supp. 258; *Forney v. Benedict*, 5 Pa. 225; *Thompson v. Peter*, 25 U. S. (12 Wheat.) 565, 6 L. Ed. 730.

<sup>54</sup> *Browning v. Paris*, 5 M. & W. 117.

<sup>55</sup> *Semmes v. Magruder*, 10 Md. 242; *Emerson v. Thompson*, 16 Mass. 429; *Shreve v. Joyce*, 36 N. J. Law, 44, 13 Am. Rep. 417. And see *Wood*, *St. of L.* (4th Ed.) § 190, note 30.

<sup>56</sup> *Kisler v. Sanders*, 40 Ind. 78; *Haines' Adm'r v. Watts' Adm'r*, 53 N. J. Law, 455, 21 Atl. 1032; *Hodnett v. Gault*, 64 App. Div. 167, 71 N. Y. Supp. 831; *Girard Trust Co. v. Owen*, 83 Kan. 692, 112 Pac. 619, 33 L. R. A. (N. S.) 262; *Scott v. De Graw*, 90 Neb. 274, 133 N. W. 179.

<sup>57</sup> *In re Kendrick*, 107 N. Y. 104, 110, 13 N. E. 762; *Stamford, Spalding & Boston Banking Co. v. Smith*, [1892] 1 Q. B. 765.

<sup>58</sup> See *Taylor v. Foster*, 132 Mass. 40; *Clapp v. Ingersol*, 11 Me. 83; *Rowell v. Lewis' Estate*, 72 Vt. 163, 47 Atl. 783.

<sup>59</sup> See *Wood on Lim.* (4th Ed.) p. 548, and digests under this head.



ply it, the court will do so in such manner as justice may require,<sup>60</sup> but that such application may not revive a debt that was already barred,<sup>61</sup> unless all the debts were barred.<sup>62</sup>

Of course, if a payment is made without apparent reference to the debts in question, it does not revive them, as where the debtor merely honors the creditor's draft,<sup>63</sup> or makes a payment which might as well have been intended to relate to another consideration, distinct from the debts in question.<sup>64</sup>

## 11. WHEN THE PERIOD BEGINS TO RUN

Inasmuch as the statute of limitations bases its bar upon the existence of a period of time during which a plaintiff has failed to prosecute his cause of action, it follows that the period of limitation does not begin to run until a cause of action arises, and also that it does begin to run as soon as a cause of action arises. Thus, for example, if a legacy is left by will to one person for life, and then to another absolutely, the latter's cause of action to recover the legacy does not arise until the death of the person first entitled thereto; and thereupon, and not until then, the period of limitation begins to run against his action to recover the legacy.<sup>65</sup>

This principle is also illustrated in the case where lands are affected by an assessment appearing to be valid on its face, and an apparent lien upon the lands, but in fact illegal and void, by reason of facts outside of the record. In such a case the owner, who has involuntarily paid the assessment in ignorance of the facts, could, in one action, seek to set aside the assessment, and also to recover back the money paid upon it, and therefore his cause of action accrues immediately upon payment; while if the circumstances had been such that he must first have the assessment set aside before he could bring an action to

<sup>60</sup> *Field v. Holland*, 6 Cranch, 8, 3 L. Ed. 136; *Cremer v. Higginson*, 1 Mason, 325, Fed. Cas. No. 3,383; *Bank of California v. Webb*, 94 N. Y. 467. And see *Clark on Cont.* (3d Ed.) p. 548.

<sup>61</sup> *Nash v. Hogson*, 6 De G. M. & G. 474; *Blake v. Sawyer*, 83 Me. 129, 21 Atl. 834, 12 L. R. A. 712, 23 Am. St. Rep. 762; *Ramsay v. Warner*, 97 Mass. 8; *Samuel v. Samuel's Adm'r*, 151 Ky. 235, 151 S. W. 676, 42 L. R. A. (N. S.) 1155, Ann. Cas. 1915A, 278; *Aston v. Aston*, 188 Ill. App. 12; *Anderson v. Nystrom*, 103 Minn. 168, 114 N. W. 742, 13 L. R. A. (N. S.) 1141, 123 Am. St. Rep. 320, 14 Ann. Cas. 54. Held contra, *Clapp v. Ingersol*, *supra*.

<sup>62</sup> *Miller v. Miller*, 169 Mo. App. 432, 155 S. W. 76.

<sup>63</sup> *Shafer v. Pratt*, 79 App. Div. 447, 80 N. Y. Supp. 109.

<sup>64</sup> *Crow v. Gleason*, 141 N. Y. 489, 36 N. E. 497; *Samuel v. Samuel*, *supra*; *Aston v. Aston*, *supra*; *Anderson v. Nystrom*, *supra*.

<sup>65</sup> *Gilbert v. Taylor*, 148 N. Y. 298, 305, 42 N. E. 713; *Matson v. Abbey*, 141 N. Y. 179, 183, 36 N. E. 11; *Gilmore v. Ham*, 142 N. Y. 1, 36 N. E. 826, 40 Am. St. Rep. 554.

recover back the payment, then his cause of action upon the latter ground would not accrue until the assessment had been set aside.<sup>66</sup>

*When Demand is Necessary*

In order to give to the statute a just interpretation, it has generally been held that, where a right exists, but a demand is necessary to entitle a person to sue, the statute begins to run from the time when the right to make the demand is complete, upon the theory that the person is equally at fault in delaying to make the demand as in delaying to sue.<sup>67</sup>

Where, for instance, a statute gives a purchaser at a tax sale the right under certain circumstances to reimbursement by the supervisors upon demand, the statute begins to run when the circumstances exist which entitle the purchaser to make demand.<sup>68</sup>

*When Delay Caused or Permitted by Defendant*

Also upon equitable grounds the courts have read into the statute an exception, when the delay in suing or in making demand is caused or permitted by the defendant; since a person may not justly complain of that which he himself has caused or permitted. Thus, if the defendant fraudulently conceals the facts from the plaintiff,<sup>69</sup> or being under a continuing duty to disclose them, omits to do so,<sup>70</sup> the statute does not begin to run until the plaintiff has knowledge. So, if the defendant has consented to keep money or property for the benefit of the plaintiff until demanded, as in the case of a deposit,<sup>71</sup> or indefinitely, as in the case of a trust.<sup>72</sup>

Further illustrations of the foregoing principles will be found under the following subdivisions:

<sup>66</sup> *Trimmer v. City of Rochester*, 134 N. Y. 76, 31 N. E. 255. Compare *Weaver v. Haviland*, 142 N. Y. 534, 37 N. E. 641, 40 Am. St. Rep. 631. See, also, *Gilmore v. Ham*, 142 N. Y. 1, 36 N. E. 826, 40 Am. St. Rep. 554; *United States Fidelity & Guaranty Co. v. Schields*, 157 Ky. 371, 163 S. W. 203; *Zurcher v. Booth*, 80 Or. 335, 157 Pac. 147.

<sup>67</sup> *Raymond v. Simonson*, 4 Blackf. (Ind.) 77; *Palmer v. Palmer*, 36 Mich. 487, 24 Am. Rep. 605; *Codman v. Rogers*, 27 Mass. (10 Pick.) 112; *Staford v. Richardson*, 15 Wend. (N. Y.) 305; *Morrison's Adm'r v. Mullin*, 34 Pa. 12; *Staniford v. Tuttle*, 4 Vt. 82.

<sup>68</sup> *Reid v. Board of Sup'rs of Albany County*, 128 N. Y. 364, 28 N. E. 367.

<sup>69</sup> See *Wood, Lim.* (4th Ed.) § 276, f. 1. See, also, p. 399, post.

<sup>70</sup> As where an agent is under a duty to account, see *King v. Mackellar*, 109 N. Y. 215, 224, 16 N. E. 201; *Bronson v. Munson*, 29 Hun (N. Y.) 54. The New York statute (Code Civ. Proc. §§ 382, 385, 410) is declaratory of these rules. See above cases.

<sup>71</sup> *Ganley v. Troy City Nat. Bank*, 98 N. Y. 487. In such a case the defendant has expressly permitted the plaintiff to delay his demand as long as the latter chooses.

<sup>72</sup> See p. 397, post.

(a) *Against a Deposit*

The time fixed by statute begins to run, against the right of a depositor with a bank or a private person to recover his deposit, only from the time when payment thereof is refused. If the period of limitation, for example, is six years, the mere lapse of six years from the time when the deposit was made is no bar to an action.<sup>73</sup>

(b) *Against a Certified Check*

A certification does not make the check due without demand. It simply binds the drawee bank to have and hold sufficient funds to pay the check to one lawfully demanding payment. In other respects it still remains a depository liable to pay only upon demand. And the mere drawing of a check is not a demand. Thus, if a depositor draws a check, which is duly certified by the drawee bank, and is subsequently paid to some one other than the payee, upon a forged indorsement of the latter's name, these facts constitute no demand. The only person authorized by the depositor to make a demand did not do so, and therefore, whenever the depositor discovers the mistake, although more than six years subsequent to the payment, he may repudiate the charge made against him, return the check, and claim payment of the sum really unpaid to him, or upon his order.<sup>74</sup>

(c) *Against a Certificate of Deposit*

In case of a deposit of money evidenced by the ordinary certificate, which simply acknowledges a deposit, a demand is necessary before action brought, as in the case of an ordinary bank deposit for which no certificate is issued.<sup>75</sup>

The certificate given for a deposit sometimes closely resembles a promissory note—as, for example, in *Howell v. Adams*,<sup>76</sup> where the certificate provided that, if the money remained on deposit six months, interest would be paid at 5 per cent. per annum, but contained no promise to pay either principal or interest; while in *Baker v. Leland*<sup>77</sup> the certificate was to the effect that the depositor had deposited a specified sum, payable to his order three months after date, with interest at 7 per cent. if left beyond a specified date. The former certificate was held to be a certificate of deposit, against which the statute would begin to run only from demand, while the latter was held to

<sup>73</sup> *Thomson v. Bank of British North America*, 82 N. Y. 1, 8; *Payne v. Gardiner*, 29 N. Y. 146, 168, 171.

<sup>74</sup> *Bank of British North America v. Merchants' Nat. Bank of New York*, 91 N. Y. 106.

<sup>75</sup> *Gutch v. Fosdick*, 48 N. J. Eq. 353, 356, 22 Atl. 590, 27 Am. St. Rep. 473; *Payne v. Gardiner*, 29 N. Y. 146, 168.

<sup>76</sup> 68 N. Y. 314.

<sup>77</sup> 9 App. Div. 365, 41 N. Y. Supp. 399.

be a promissory note, against which the statute would begin to run from three months after its date.<sup>78</sup>

(d) *Against Demand Notes*

Upon a note payable on demand, and whether with or without interest, an action may be maintained against the maker without any demand, because it is due; and the statute of limitations therefore begins to run at once, even though no demand is made.<sup>79</sup> The same rule applies where expressions equivalent to "on demand" are used—such as "on request," "on being called on"—for in all the term is employed to indicate that the money is due, and not to provide a condition precedent to its payment.<sup>80</sup> But terms of similar import may, of course, be so employed as to require a demand as a condition precedent; as, where a note was payable 24 months after demand, and it was held that the statute did not begin to run until a demand was made, and the time mentioned had expired.<sup>81</sup>

The principle by which the statute of limitations begins to run upon a demand note, as between the holder and the maker, from its inception, applies also in an action against a guarantor, whose obligation is co-extensive with that of the maker; for, the moment the maker fails in law to perform his contract, a cause of action accrues against the guarantor upon which he could at once be sued.<sup>82</sup> If, however, the guarantor makes it a part of his collateral contract of guaranty that the maker shall pay the note upon demand, then his obligation would not mature until an actual demand of payment has been made upon the maker.<sup>83</sup>

(e) *Against Indorser on Demand Note*

In New York it is the settled law that, a note payable on demand, with interest, being a continuing security, no cause of action arises against an indorser until after actual demand. The plain import

<sup>78</sup> See, also, *Hunt v. Divine*, 37 Ill. 137; *Miller v. Austen*, 13 How. 218, 14 L. Ed. 119; *Bank of Orleans v. Merrill*, 2 Hill (N. Y.) 295.

<sup>79</sup> *Wheeler v. Warner*, 47 N. Y. 519, 7 Am. Rep. 478; *In re King's Estate*, 94 Mich. 411, 423, 54 N. W. 178; *Newman v. Kettelle*, 13 Pick. (Mass.) 418; *Fenno v. Gay*, 146 Mass. 118, 15 N. E. 87; *Larason v. Lambert*, 12 N. J. Law, 247; *Kingsbury v. Butler*, 4 Vt. 458; *Wenman v. Mohawk Ins. Co.*, 13 Wend. (N. Y.) 267, 28 Am. Dec. 464; *Norton v. Ellam*, 2 Mees. & W. 461; *Sewell v. Smith*, 151 App. Div. 584, 136 N. Y. Supp. 371.

<sup>80</sup> *Howland v. Edmonds*, 24 N. Y. 307; *Norton v. Ellam*, 2 Mees. & W. 461; *McMullen v. Rafferty*, 89 N. Y. 456, 459.

<sup>81</sup> *Thorpe v. Booth*, Ryan & M. 388; also, *Sinkler v. Turnpike Co.*, 3 Pen. & W. (Pa.) 149; *Miles v. Bough*, 3 Adol. & E. (N. S.) 845; *Ross v. Lafayette & Q. R. Co.*, 6 Ind. 299.

<sup>82</sup> *McMullen v. Rafferty*, 89 N. Y. 456; *Sibley's Ex'rs v. Stull*, 15 N. J. Law, 332.

<sup>83</sup> *Nelson v. Bostwick*, 5 Hill (N. Y.) 37, 40 Am. Dec. 310.

of the indorser's contract is that the maker of the note will pay the same at a certain time and place named, and, if it remains unpaid after demand made at such time and place, he will pay it upon notice of its nonpayment. And until then the statute of limitations does not begin to run.<sup>84</sup> But as, against the maker, the note is due at its inception, and the statute begins to run against him from its date, failure to make demand within the statutory period operates as a bar in his favor, and a demand thereafter will not serve to lay a basis for an action against the indorser, who is, therefore, discharged by the laches of the holder of the note.<sup>85</sup>

(f) *In Case of an Express Trust*

The statute of limitations does not begin to run against the beneficiary, in the case of an express trust, until the trustee, with the knowledge of the beneficiary, has disavowed and repudiated the trust.<sup>86</sup> The rule is different in case of implied or constructive trusts forced upon the conscience of a party as a means of preventing the consummation of a wrong.<sup>87</sup> But in the case of admitted trusts the possession of the trustee is not hostile or adverse to the claim of the beneficiary, and is consistent with the continuing recognition of the trust relation, and the right of the beneficiary to wait, until that relation is distinctly disclaimed. The cases arising in bankruptcy, or under the insolvent laws of a state, are numerous to the effect that from the time of the institution of the proceedings and the appointment of an assignee or trustee in bankruptcy or insolvency, the running of the statute is suspended as to claims not then barred, and that the assignee or trustee cannot resist payment because more than the statutory period for bringing an action on the claim has elapsed before payment was demanded.<sup>88</sup> The case of the appointment of a receiver for the final winding up of the estate of a dissolved corporation is plainly

<sup>84</sup> *Parker v. Stroud*, 98 N. Y. 379, 50 Am. Rep. 685; *Merritt v. Todd*, 23 N. Y. 28, 80 Am. Dec. 243; *Pardee v. Fish*, 60 N. Y. 265, 19 Am. Rep. 176.

<sup>85</sup> *Shutts v. Fingar*, 100 N. Y. 539, 3 N. E. 588, 53 Am. Rep. 231.

<sup>86</sup> *Gisborn v. Charter Oak Life Ins. Co.*, 142 U. S. 326, 337, 12 Sup. Ct. 277, 35 L. Ed. 1029; *Miles v. Thorne*, 38 Cal. 335, 99 Am. Dec. 384; *Hearst v. Pujol*, 44 Cal. 230; *Grant v. Burr*, 54 Cal. 298; *Henry v. Confidence Gold & Silver Min. Co.*, 1 Nev. 619; *Bacon v. Rives*, 106 U. S. 99, 1 Sup. Ct. 3, 27 L. Ed. 69; *Seymour v. Freer*, 8 Wall. 202, 19 L. Ed. 306; *Lammer v. Stoddard*, 103 N. Y. 672, 9 N. E. 328; *Zebbley v. Farmers' Loan & Trust Co.*, 139 N. Y. 461, 34 N. E. 1067; *Van Camp v. Searle*, 147 N. Y. 150, 161, 41 N. E. 427.

<sup>87</sup> *Lammer v. Stoddard*, 103 N. Y. 672, 9 N. E. 328; *In re Leiman's Estate*, 32 Md. 225, 3 Am. Rep. 132.

<sup>88</sup> *Ex parte Ross*, 2 Glyn & J. 46, 330; *Minot v. Thacher*, 7 Metc. (Mass.) 348, 41 Am. Dec. 444; *Parker v. Sanborn*, 7 Gray (Mass.) 191; *Von Sachs v. Kretz*, 72 N. Y. 548, 556.

within the reason upon which the authorities cited proceed.<sup>89</sup> But in the case of an executor or administrator, although in a sense he is a trustee for creditors and persons interested in the estate of the decedent as legatees or next of kin,<sup>90</sup> he may nevertheless interpose the statute of limitations as a defense to an action to recover a debt not barred at the death of the testator. This right, subject to certain qualifications, is generally recognized by statute, it being the policy of the law to regulate the settlement of estates of decedents so that claims should be presented and adjusted without unreasonable delay. There is little analogy between a person standing in such a relation and the position of a receiver of the estate of a dissolved corporation, appointed as the officer and agent of the court to get its assets, and distribute them among its then existing creditors; and as against the latter he cannot plead the statute.<sup>91</sup>

(g) *In Actions against an Attorney*

By the common law an attorney at law was not subject to an action for moneys of his client, collected in his professional capacity, until after demand and refusal to pay, except in cases where he had applied the money to his own use, or otherwise wrongfully dealt with it.<sup>92</sup> When he has acted in good faith, he should be protected from the costs of a suit until, upon demand, he neglects or refuses to pay. But, if the client has knowledge of the receipt of the money by the attorney, then the statute of limitations will begin to run from the time when the client had such knowledge, because upon that his right to make the demand may be said in such cases to depend.<sup>93</sup> But the client's right of action against an attorney for negligence—as, for example, in the examination of a title—accrues at the time the examination is made and reported, and not when damages result therefrom.<sup>94</sup>

<sup>89</sup> *Kirkpatrick v. McElroy*, 41 N. J. Eq. 555, 7 Atl. 647.

<sup>90</sup> The legatees and distributees may compel an accounting after any lapse of time. *Norris' Appeal*, 71 Pa. 106.

But great lapse of time may raise a presumption that the estate has been settled. *Fuller v. Cushman*, 170 Mass. 286, 49 N. E. 631.

<sup>91</sup> *Ludington v. Thompson*, 153 N. Y. 499, 47 N. E. 903. For an explanation of the present English statute of limitations, as applied to trustees, see *Birrell's Duties and Liabilities of Trustees*, p. 153 et seq.; *Thorne v. Heard*, [1894] 1 Ch. 599; *In re Gurney*, [1893] 1 Ch. 590; *In re Bowden*, 45 Ch. Div. 444; *Swain v. Bringeman*, [1891] 3 Ch. 233; *In re Page, Jones v. Morgan*, [1893] 1 Ch. 304; *Somerset v. Earl Poulett*, [1894] 1 Ch. 231; *How v. Earl Winterton*, [1896] 2 Ch. 626.

<sup>92</sup> *Taylor v. Bates*, 5 Cow. (N. Y.) 376. See *Wood v. Young*, 141 N. Y. 211, 218, 36 N. E. 193.

But as to whether demand is necessary, see p. 126, ante.

<sup>93</sup> *Wood v. Young*, 141 N. Y. 211, 218, 36 N. E. 193; *Bronson v. Munson*, 29 Hun (N. Y.) 54. See p. 399, post.

<sup>94</sup> *Schade v. Gehner*, 133 Mo. 252, 34 S. W. 576; *Moore v. Juvenal*, 92 Pa.

(h) *Where Fraud is the Basis of the Remedy*

Where fraud is the basis of the action, the question is presented whether the statute begins to run until the plaintiff has knowledge of the existence of the facts constituting the cause of action.

Irrespective of express provision in the statute, it is a manifest principle that a person may not avail himself of the statute when he himself caused or permitted the delay; and it is commonly asserted that, if he fraudulently concealed the existence of the cause of action, he may not successfully plead the statute.<sup>95</sup> There is great difficulty however in determining what conduct amounts to such concealment.<sup>96</sup> Where the wrongdoer has previously assumed a continuing duty to disclose, the cases are agreed that his omission to do so will prevent the statute from running so long as the injured party is not chargeable with knowledge; as where an agent or bailee undertakes to keep his principal or bailor informed in respect to property entrusted to his care.<sup>97</sup> It is difficult to understand how any other form of concealment can be regarded as the cause of the plaintiff's delay, but some cases have so decided. It has been held, for instance, that property furtively stolen may be recovered from the thief after the lapse of the statutory period.<sup>98</sup>

484; *Lilly v. Boyd*, 72 Ga. 83. As to the running of the statute in actions by an attorney to recover for services, see *Ennis v. Pullman Palace-Car Co.*, 165 Ill. 161, 46 N. E. 439; *Adams v. Ft. Plain Bank*, 36 N. Y. 255; *Hale's Ex'rs v. Ard's Ex'rs*, 48 Pa. 22.

As to the distinction between the two cases stated in the text, see text above.

The rule is the same in case of fraud, and although damage is necessary to constitute either tort, the statute runs not from the time of damage, but from the time of the wrongful act, because there is a breach of contract as well as a tort and the shorter limitation always governs. *Howell v. Young*, 5 B. & C. 259; *Crowley v. Johnston*, 96 App. Div. 319, 89 N. Y. Supp. 258.

<sup>95</sup> *Wood on Lim.* (4th Ed.) § 276, f. 1; 25 Cyc. p. 1213; *Graham v. Stanton*, 177 Mass. 231, 58 N. E. 1023; *Lightfoot v. Davis*, 198 N. Y. 261, 272, 91 N. E. 582, 29 L. R. A. (N. S.) 119, 139 Am. St. Rep. 817, 19 Ann. Cas. 747; *Bailey v. Glover*, 21 Wall. 342, 22 L. Ed. 636.

In some states this rule is expressly embodied in the statute. See *Parmelee v. Price*, 105 Ill. App. 271, affirmed 208 Ill. 544, 70 N. E. 725.

<sup>96</sup> *Caldwell v. Ulsh* (Ind. App.) 103 N. E. 879; *Glover v. Nat. Bank of Commerce in New York*, 156 App. Div. 247, 141 N. Y. Supp. 409.

See *Wood on Lim.* (4th Ed.) § 276, f. 2, where many cases are collected.

<sup>97</sup> *McDowell v. Potter*, 8 Pa. 190, 49 Am. Dec. 503; *King v. Mackellar*, 109 N. Y. 215, 16 N. E. 201; *Bronson v. Munson*, 29 Hun (N. Y.) 54; *Faust v. Hosford*, 119 Iowa, 97, 93 N. W. 58; *Wickersham v. Lee*, 83 Pa. 416. See *Code Civ. Proc. N. Y.* § 410, subd. 1.

<sup>98</sup> *Quimby v. Blackey*, 63 N. H. 77; *Lightfoot v. Davis*, 198 N. Y. 261, 264, 91 N. E. 582, 29 L. R. A. (N. S.) 119, 139 Am. St. Rep. 817, 19 Ann. Cas. 747.

It is believed that these cases are anomalous and that the doctrine involved is estoppel, not fraud.

In some states the statute broadly provides that in actions of fraud the period of limitation shall not begin until the plaintiff has knowledge of the existence of the cause of action.<sup>99</sup>

## 12. ADVERSE POSSESSION

If, in litigation respecting the title to real estate, it appears that the defendant has maintained what the law deems a perfect possession, "if continued without interruption during a whole period which is prescribed by the statute for the enforcement of the right of entry, such possession is evidence of a fee. Independent of positive or statute law, the possession supposes an acquiescence in all persons claiming an adverse interest, and upon this acquiescence is founded the presumption of the existence of some substantial reason (though, perhaps, not known) for which the claim of an adverse interest was forborne. Not only every legal presumption, but every consideration of public policy, requires that this evidence of right should be taken to be of very strong, if not of conclusive, force."<sup>1</sup> The possession which will thus bar the right of the former owner to recover property must be an open, visible, continuous, and exclusive possession, with a claim of ownership, such as will notify parties seeking information upon the subject that the premises are not held in subordination to any title or claim of others, but adversely to all titles and all claims.<sup>2</sup> This subject is usually regulated by statutes of limitation, which frequently enumerate the particular facts which must be shown in order to establish a title by adverse possession.<sup>3</sup>

## 13. MUTUAL, OPEN, AND CURRENT ACCOUNTS

The statute of 21 Jac. I, c. 16, expressly excepted from its operation "such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants." It was held that the exception in that statute applied only to the action of account, or to an action on the case for not accounting, and, after considerable vacillation in the decisions, that accounts within the exception were not barred,

<sup>99</sup> See Wood, *Lim.* (4th Ed.) § 276, 1 and 5b.

So in New York in actions cognizable in equity. Code Civ. Proc. § 382, subd. 5.

<sup>1</sup> Angel on Limitations, quoted in *Sharon v. Tucker*, 144 U. S. 544, 12 Sup. Ct. 720, 36 L. Ed. 532.

<sup>2</sup> *Sharon v. Tucker*, 144 U. S. 533, 12 Sup. Ct. 720, 36 L. Ed. 532; *Baker v. Oakwood*, 123 N. Y. 16, 25 N. E. 312, 10 L. R. A. 387.

<sup>3</sup> Code Civ. Proc. N. Y. § 365 et seq.; *Miller v. Long Island R. Co.*, 71 N. Y. 380; *Hall v. Powel*, 4 Serg. & R. (Pa.) 465, 8 Am. Dec. 722.



even if there were no items on the other side of the account, within six years.<sup>4</sup> It was also held that the exception in the statute extended only to accounts concerning the trade of merchandise between merchant and merchant, and not to other accounts. Other accounts were held to be within the statute, and the cause of action upon them was held to accrue from the last item of credit therein.<sup>5</sup> It was only mutual, open, and current accounts that could come within the exception of the statute as to merchants' accounts; and in the case of accounts not concerning the trade of merchandise, to escape the bar of the statute, there must have been new accounts and items of credit within six years.<sup>6</sup>

This statute, with slight verbal alterations, having become the law of New York, the exception as to merchants' accounts continued until the adoption of the Revised Statutes, and it was early held that the law enacted in that state should receive the same construction as the statute of Jac. I had received in England.<sup>7</sup> But there had been some confusion and uncertainty in the various decisions, and there was some departure from the law as stated in England.<sup>8</sup> The provisions of the Revised Statutes, and the subsequent provisions of the Code, produced no change in the law as previously settled in New York, in respect to accounts, which has just been stated. "(1) The exception relating to mutual, open, and current accounts extends to all persons, whether merchants or others; (2) where all the accounts have ceased for six years, the demand is barred, and, consequently, that, where there is an open, mutual account within six years, the whole account may be recovered; (3) that the limitation of the statute applies as well to accounts between merchants as others."<sup>9</sup>

Where goods are delivered by a debtor to his creditor as an account against him, it will not be presumed that they were delivered in payment. Before they can be held to have been so delivered, there must be proof that it was so intended, and that both parties so understood it. An account of items upon one side and payments upon the other

<sup>4</sup> Robinson v. Alexander, 8 Bligh (N. S.) 352; Inglis v. Haigh, 8 Mees. & W. 770.

<sup>5</sup> Catling v. Skoulding, 6 Term R. 189.

<sup>6</sup> Green v. Disbrow, 79 N. Y. 1, 6, 35 Am. Rep. 496; Day v. Mayo, 154 Mass. 472, 28 N. E. 898.

<sup>7</sup> Ramschander v. Hammond, 2 Johns. (N. Y.) 200.

<sup>8</sup> Green v. Disbrow, 79 N. Y. 1, 6, 35 Am. Rep. 496.

<sup>9</sup> Green v. Disbrow, 79 N. Y. 1, 6, 35 Am. Rep. 496. Also Bates v. Sabin, 64 Vt. 511, 24 Atl. 1013, 1014; Miller v. Cinnamon, 168 Ill. 447, 48 N. E. 45; Princeton & K. B. Turnpike Co. v. Gulick, 14 N. J. Law, 545.

There are similar statutes in most states. Set Wood, Lim. (4th Ed.) § 277.

is not a mutual account. The payments do not, in such case, enter into the account. They are at once applied, and reduce the account.<sup>10</sup>

Where there are mutual accounts between two persons, it is always the understanding that the accounts upon one side shall offset that upon the other, and in law the debt due from one to the other is only the balance left after the application in reduction of the account on the opposite side. The very theory on which the provision of the statute of limitations relating to accounts is based is that the credits are mutual, and that the account is permitted to run with the view of ultimate adjustment by a settlement and payment of the balance.<sup>11</sup> "In ordinary cases of mutual dealings, no obligation is created in regard to each particular item, but only for the balance; and it is the constantly varying balance which is the debt."<sup>12</sup> Thus, where a party, who has items charged against him upon an account, delivers goods to the other party on the mutual understanding that they are to enter into the account between the parties, to be adjusted when the account should be settled, the delivery does not constitute a payment on account of existing items, but they would be credited on the opposite side of the account, so that in any future settlement between the parties he could have the benefit of them. The legal effect of such a transaction is that the party delivering the goods sells them to the other party, the price to be credited on the account.<sup>13</sup>

#### 14. LIMITATIONS AS AGAINST THE GOVERNMENT

Apart from the operation of statutes of limitation, the defenses of stale claims and laches cannot be set up against the government.<sup>14</sup> This doctrine was embodied in the phrase, "*Nullum tempus occurrit regi.*" This maxim is founded, not on the ground of extraordinary prerogative, but upon a great public policy. The government can

<sup>10</sup> *Green v. Disbrow*, 79 N. Y. 1, 9, 35 Am. Rep. 496. Compare *Warren v. Sweeney*, 4 Nev. 101; *Adams v. Patterson*, 35 Cal. 122; *Lark v. Cheatham*, 80 Ga. 1, 5 S. E. 290; *Webster v. Byrnes*, 32 Md. 86; *Adams v. Carroll*, 85 Pa. 209.

<sup>11</sup> *Green v. Disbrow*, 79 N. Y. 1, 10, 35 Am. Rep. 496; *Buena Vista County v. Woodbury County*, 163 Iowa, 626, 145 N. W. 282; *Hurst v. Brennen*, 239 Pa. 216, 86 Atl. 778, Ann. Cas. 1914D, 428; *Moseley v. Bolster*, 201 Mass. 135, 87 N. E. 606.

<sup>12</sup> *Abbott v. Keith*, 11 Vt. 525; *Trueman v. Fenton*, 1 Smith, Lead. Cas. (Hare & W. Notes) 966.

<sup>13</sup> *Green v. Disbrow*, 79 N. Y. 1, 10, 35 Am. Rep. 496; *Chambers v. Marks*, 25 Pa. 296; *Norton v. Larco*, 30 Cal. 126, 89 Am. Dec. 70.

<sup>14</sup> *U. S. v. Dalles Military Road Co.*, 140 U. S. 599-632, 11 Sup. Ct. 988, 35 L. Ed. 560; *U. S. v. Kirkpatrick*, 9 Wheat. 720, 6 L. Ed. 199.

transact its business only through its agents, and its fiscal operations are so various, and its agencies so numerous and scattered, that the utmost vigilance would not save the public from the most serious loss, if the doctrine of laches could be applied to its transactions.<sup>15</sup>

But the principle is confined to cases where the government has a direct pecuniary interest in the subject-matter of the litigation.<sup>16</sup> Thus, for example, if a suit is brought in the name of the United States, to set aside public land patents issued by one of its departments, if the government has in fact no interest in the result, the suit being brought for the interest of individuals, the statute of limitation, if a bar against the latter, may be set up against the United States as the nominal plaintiff.<sup>17</sup> But the fact that a government is not bound by statutes of limitation, does not involve the conclusion that a citizen is not bound by them, as between himself and the government;<sup>18</sup> and agents of the government, when treated as principals, may rely upon the protection of the statute.<sup>19</sup>

Although the principles above stated had become established in connection with the equitable doctrine of laches and the common-law rule respecting stale claims, irrespective of the operation of statutes of limitation, the same principles apply under such statutes, but the application of the principles is generally controlled by statutes fixing some period within which the government, although an actual party in interest, must bring actions, if at all. Thus, by Code Civ. Proc. N. Y. § 362, it is provided: "That the people of the state will not sue a person for or with respect to real property, or the issues or profits thereof, by reason of the right or title of the people to the same, unless either (1) the cause of action accrued within 40 years before the action is commenced; or (2) the people, or those from whom they claim, have received the rents and profits of the real property, or of some part thereof, within the same period of time." And by section 389 it is provided, with reference to actions other than for the recovery of real property, that the limitations prescribed "apply alike to actions brought in the name of the people of the state, or for their benefit, and to actions by private persons." And, even apart from the operation of such statutes, the maxim, "Lapse of time is no bar to the rights of the sovereign," applies only to a sovereign state, and not

<sup>15</sup> U. S. v. Kirkpatrick, 9 Wheat. 720, 6 L. Ed. 199.

<sup>16</sup> San Pedro & C. del Agua Co. v. U. S., 146 U. S. 120, 135, 13 Sup. Ct. 94, 36 L. Ed. 911; U. S. v. Des Moines Nav. & Ry. Co., 142 U. S. 510-539, 12 Sup. Ct. 308, 35 L. Ed. 1099.

<sup>17</sup> Curtner v. United States, 149 U. S. 662, 672, 13 Sup. Ct. 985, 1041, 37 L. Ed. 890.

<sup>18</sup> Stanley v. Schwalby, 147 U. S. 508, 517, 13 Sup. Ct. 418, 37 L. Ed. 259.

<sup>19</sup> Ware v. Galveston City Co., 111 U. S. 170, 4 Sup. Ct. 337, 28 L. Ed. 393.

to municipal corporations deriving their powers from the state; and so the statute runs against cities, towns, counties, and school districts, except as otherwise provided by statute.<sup>20</sup>

## 15. EXCEPTIONS AND DISABILITIES

It is very evident that there are classes of cases where it would be most unjust to allow the mere lapse of time to bar the enforcement of a cause of action. Such, for example, would be cases of infants; for an infant, being under general legal disabilities in many respects, ought, not, during his minority, to have time counted against him under the statute. But, as the absolute bar created by the lapse of a specified time rests upon a statutory basis, so any exceptions to the application of the statutes of limitation must be sought in the statutes,<sup>21</sup> and accordingly the details of the law upon this subject vary in different jurisdictions.

Thus the New York Code of Civil Procedure, after regulating the subject of limitations in actions for the recovery of real property (sections 362-374), provides in section 375 that if a person who might maintain an action to recover real property, or the possession thereof, or make an entry, or interpose the defense or counterclaim founded on the title to real property, or rents or services out of the same, is, when his title first descends, or his cause of action or right of entry first accrues, either (1) within the age of 21; or (2) insane; or (3) imprisoned on a criminal charge, or in execution upon conviction of a criminal offense, for a term less than for life—the time of such disability is not a part of the time limited for commencing the action, or making the entry, or interposing the defense or counterclaim, except that the time so limited cannot be extended more than 10 years after the disability ceases, or after the death of the person so disabled.

So, again, after regulating the period of limitation in actions other than for the recovery of real property (sections 376-395), the Code

<sup>20</sup> State ex rel. Chemical Nat. Bank v. School Dist. No. 9, 30 Neb. 520, 46 N. W. 613, and 27 Am. St. Rep. 420; Pimental v. City of San Francisco, 21 Cal. 351; Clark v. Iowa City, 20 Wall. 583, 22 L. Ed. 427; Evans v. Erie Co., 66 Pa. 225; Inhabitants of Kennebunkport v. Smith, 22 Me. 445; Brown v. Trustees of Schools, 224 Ill. 184, 79 N. E. 579, 115 Am. St. Rep. 146, 8 Ann. Cas. 96.

A reference to the various state statutes will be found in Wood, Lim. (4th Ed.) p. 165.

A state statute will not defeat an action by the United States. U. S. v. Chesapeake & D. Canal Co. (D. C.) 206 Fed. 964.

<sup>21</sup> U. S. v. Maillard, 4 Ben. (U. S.) 459, Fed. Cas. No. 15,709; Semmes v. Hartford Ins. Co., 80 U. S. (13 Wall.) 158, 20 L. Ed. 490.

provides, in section 396, that in all these cases, with two or three specified exceptions, the time of disability caused by infancy, insanity, or imprisonment under the circumstances above mentioned, is not a part of the time limited for commencing the action, except that the time so limited cannot be extended more than five years by any such disability except infancy; or, in any case, more than one year after the disability ceases.

So, again, by Code Civ. Proc. § 401, it is provided that: "If, when the cause of action accrues against a person, he is without the state, the action may be commenced within the time limited therefor, after his return into the state. If, after a cause of action has accrued against a person, he departs from the state, and remains continuously absent therefrom for the space of one year or more, or if, without the knowledge of the person entitled to maintain the action, he resides within the state under a false name, the time of his absence or of such residence within the state, under such false name, is not a part of the time limited for the commencement of the action." This section does not apply while the designation of another resident of the state as a person upon whom to serve summons or other process or papers, executed and filed in accordance with the provisions of section 430, or subdivision 2 of section 432, remains in force.

It would obviously be unjust to provide that a claim should be barred unless prosecuted within a specified period, without also making some special provision for the case of absence from the jurisdiction of the person against whom the action should be brought; for otherwise he might, by absenting himself, render it impracticable to institute a suit against him, and then return after the statutory period had expired, and take advantage of the bar of the statute. Accordingly, statutes of limitation usually provide, as has already been seen in respect to the statutes of New York, that the running of the statute shall be suspended while the proposed defendant is out of the jurisdiction. The various statutes differ somewhat in the phraseology and in the particulars adopted to regulate this subject. It has been held that, if a person resides in another state, the period of limitation does not run as to a claim against him, under the law of the forum, even though he has an office for the transaction of business there, or owns land there;<sup>22</sup> and under section 401 of the New York Code, if, after a cause of action has accrued against a person, he departs from the state, and remains continuously absent therefrom for the space of one year or more, the time of his absence is not a part of

<sup>22</sup> *Bennett v. Cook*, 43 N. Y. 537, 3 Am. Rep. 727; *Riker v. Curtis*, 17 Misc. Rep. 134-136, 39 N. Y. Supp. 340; *Waterman v. A. & W. Sprague Mfg. Co.*, 55 Conn. 554, 576, 12 Atl. 240.

the time limited for the commencement of the action.<sup>23</sup> Statutes which provide for a suspension of the running of the statute during absence of the debtor from the state and until his return, use the term "return" in the sense of "come into the state," and so one who comes within the state for the first time thereby "returns" to it, and until then the statute does not run.<sup>24</sup>

It sometimes happens that several distinct disabilities recognized by statute coexist, each of them being sufficient for the time being to suspend the operation of the statute. Thus, a person owning a cause of action, might at the same time be a minor and also imprisoned on a criminal charge, or a minor and insane. In such cases it follows that the statute does not again begin to run until all disabilities are removed. If, for example, a person 18 years of age should be imprisoned for a term of 10 years, there would be no reason why the suspension of the statute should be for a shorter period than it would have been if he had been of full age at the time when his imprisonment began.<sup>25</sup>

"In the absence of express statute or controlling adjudication to the contrary, the general rule is well settled that, when the statute of limitations has once begun to run, its operation is not suspended by a subsequent disability to sue."<sup>26</sup> The statutes relating to exceptions and disabilities, elsewhere considered, include qualifications of this general principle. The operation of the general principle is illustrated in the case where there are successive owners of the cause of action and the right to prosecute arises in the time of the first. Here the period of limitation commences at that time, and continues attached to the demand during the several subsequent changes; and, when the statutory period has elapsed, the demand is barred, though the last proprietor has recently acquired his right.<sup>27</sup>

<sup>23</sup> Even though he makes casual visits to the state. *Connecticut Trust & Safe Deposit Co. v. Wead*, 172 N. Y. 497, 65 N. E. 261, 92 Am. St. Rep. 756.

<sup>24</sup> *Burrows v. French*, 34 S. C. 165, 13 S. E. 355, 27 Am. St. Rep. 811; *Alexander v. Burnet*, 5 Rich. (S. C.) 189; *Ruggles v. Keeler*, 3 Johns. (N. Y.) 263, 3 Am. Dec. 482; *Fowler v. Hunt*, 10 Johns. (N. Y.) 464. See *Langdon v. Doud*, 83 Am. Dec. 645, note; *Moore v. Armstrong*, 36 Am. Dec. 76; *Musurus Bey v. Gadban*, [1894] 2 Q. B. 352.

A foreign corporation cannot come into the state. *Boardman v. Lake Shore & M. S. Ry. Co.*, 84 N. Y. 157. Unless special provision in the statute. *Wehrenberg v. New York, N. H. & H. R. Co.*, 124 App. Div. 205, 108 N. Y. Supp. 704.

<sup>25</sup> 3 Pars. Cont. 95; Code Civ. Proc. N. Y. § 409.

<sup>26</sup> *Bauserman v. Blunt*, 147 U. S. 647-657, 13 Sup. Ct. 466, 37 L. Ed. 316; *Walden v. Gratz*, 1 Whcat. 292, 4 L. Ed. 94; *McDonald v. Hovey*, 110 U. S. 619, 4 Sup. Ct. 142, 28 L. Ed. 269; *Grady v. Wilson*, 115 N. C. 344, 20 S. E. 518, 44 Am. St. Rep. 461.

<sup>27</sup> *Bucklin v. Bucklin*, 1 Abb. Dec. (N. Y.) 251; *Cooley v. Lobdell*, 153 N. Y. 596-603, 47 N. E. 783.

So, if a cause of action in ejectment descends upon an infant heir, the disability of the heir does not suspend the running of the statute.<sup>28</sup> Nor may there be a cumulating, or tacking of disabilities. Where, for example, one who was an infant when his cause of action accrued afterwards becomes of unsound mind, this disability cannot be added to that of infancy to extend the time for bringing suit.<sup>29</sup>

But whether a subsequently arising disability suspends the running of the statute depends upon the precise language of the particular statute. While infancy, insanity, and imprisonment do not, as a rule, affect the period of limitation, unless they exist at its beginning,<sup>30</sup> the statutes generally provide otherwise in respect to other exceptions and disabilities, as has already been shown in the case of absence from the state. Similar provisions usually exist when the party entitled to sue is an alien enemy,<sup>31</sup> when he is stayed by law, or when there has been an ineffectual attempt to enforce the claim by litigation or arbitration.<sup>32</sup> So, when either party to the controversy dies, the statute is suspended for a year or more to afford opportunity for the appointment of representatives.<sup>33</sup>

## 16. WHEN THE ACTION IS COMMENCED

Inasmuch as the period of limitation is measured, in a given case, from the time when the cause of action accrues to the time when the action is commenced, it is important to determine what constitutes a commencement of an action. This is a matter regulated by statute in the several states. In New York it is provided that the action is begun either by service of the summons upon the defendant, or by delivering the same, for the purpose of service, to the sheriff or other officer, and thereafter, within a specified period, effecting personal service upon the defendant, or beginning the publication of the summons in the statutory method.<sup>34</sup>

<sup>28</sup> *Messinger v. Foster*, 115 App. Div. 689, 101 N. Y. Supp. 387.

<sup>29</sup> *Sharp v. Stephens' Committee*, 52 S. W. 977, 21 Ky. Law Rep. 687.

<sup>30</sup> *Congregational Church Bldg. Soc. v. Osborn*, 153 Cal. 197, 94 Pac. 881; *Wood, Lim.* (4th Ed.) § 242a, 1.

<sup>31</sup> *Wood, Lim.* (4th Ed.) § 242.

<sup>32</sup> *Id.* ch. XXIII.

<sup>33</sup> See Code Civ. Proc. N. Y. §§ 391, 402, 403.

<sup>34</sup> Code Civ. Proc. §§ 398, 399; *Riley v. Riley*, 141 N. Y. 409, 36 N. E. 398; *Clare v. Lockard*, 122 N. Y. 263, 25 N. E. 391, 9 L. R. A. 547.

## 17. THE STATUTE AFFECTS THE REMEDY ONLY

The statute of limitations does not after the prescribed period, discharge or pay the debt, but it simply bars a remedy thereon.<sup>35</sup> The debt, and the obligation to pay the same, remain, and the arbitrary bar of the statute alone stands in the way of the creditor seeking to compel payment. The legislature could repeal the statute of limitations, and then the payment of a debt upon which the right of action was barred at the time of the repeal could be enforced by action, and the statutory rights of the debtor are not invaded by such legislation.<sup>36</sup> The statute of limitations acts only upon the remedy; does not impair the obligation of a contract nor pay a debt, nor produce a presumption of payment, but is merely a statutory bar to a recovery.<sup>37</sup> Thus, if notes are given, secured by a mortgage under seal, the fact that the statute has run against the notes does not prevent a foreclosure of the mortgage, as to which the longer period of limitation applicable thereto has not expired; for the notes are not paid and, until they are paid, the mortgage is a subsisting security.<sup>38</sup>

## 18. THE LAW OF THE FORUM GOVERNS

The limitation of actions is governed by the *lex fori*, and is controlled by the Legislature of the state in which the action is brought, as construed by the highest court of that state, even if the legislative act or the judicial construction differs from that prevailing in other juris-

<sup>35</sup> *Campbell v. Holt*, 115 U. S. 620, 6 Sup. Ct. 209, 29 L. Ed. 483; *U. S. v. Chesapeake & D. Canal Co.*, 206 Fed. 964; *Munroe v. Stanley*, 220 Mass. 438, 107 N. E. 1012; *Cowan v. Mueller*, 176 Mo. 192, 75 S. W. 606; *Glover v. National Bank of Commerce in New York*, 156 App. Div. 247, 141 N. Y. Supp. 409. Contra: *Hite v. Keene*, 149 Wis. 207, 134 N. W. 383, 135 N. W. 354, Ann. Cas. 1913D, 251; *Osborne v. Grand Trunk R. Co.*, 87 Vt. 104, 88 Atl. 512, Ann. Cas. 1916C, 74.

<sup>36</sup> *Campbell v. Holt*, 115 U. S. 620, 6 Sup. Ct. 209, 29 L. Ed. 483.

<sup>37</sup> *Hulbert v. Clark*, 128 N. Y. 295, 28 N. E. 638, 14 L. R. A. 59; *Quantock v. England*, 5 Burrows, 2628; *Johnson v. Albany & S. R. Co.*, 54 N. Y. 416, 13 Am. Rep. 607; *Allen v. Glenn*, 87 Ga. 414, 13 S. E. 565.

<sup>38</sup> *Hulbert v. Clark*, 128 N. Y. 295, 28 N. E. 638, 14 L. R. A. 59; *Lewis v. Hawkins*, 23 Wall. 119, 23 L. Ed. 113; *Hardin v. Boyd*, 113 U. S. 756, 5 Sup. Ct. 771, 28 L. Ed. 1141; *Coldcleugh v. Johnson*, 34 Ark. 312; *Thayer v. Mann*, 19 Pick. (Mass.) 535; *Hancock v. Franklin Ins. Co.*, 114 Mass. 155; *Joy v. Adams*, 26 Me. 330; *Belknap v. Gleason*, 11 Conn. 160, 27 Am. Dec. 721; *Bal-lou v. Taylor*, 14 R. I. 277; *Spears v. Hartly*, 3 Esp. 81; *Higgins v. Scott*, 2 Barn. & Adol. 413; *Jackson ex dem. Sackett v. Sackett*, 7 Wend. (N. Y.) 94; *Pratt v. Huggins*, 29 Barb. (N. Y.) 277; *Mayor, etc., of New York v. Colgate*, 12 N. Y. 140; *Dinniny v. Gavin*, 4 App. Div. 298, 39 N. Y. Supp. 485.



dictions.<sup>39</sup> This principle operates in the case where the period of limitation in another state where the cause of action arose has not expired, although that of the state where the action is brought has expired, and in the case where the period prescribed by the laws where the action is brought has not yet expired, although that of the state where the cause of action arose has expired. In both cases the only question relates to the operation of the *lex fori*.<sup>40</sup> But a state cannot constitutionally provide that an action shall not be brought in its courts upon a judgment recovered in another state upon the original cause of action, which would have been barred in the former if the original action had been brought there. Such a statute, instead of being a statute of limitations in any sense known to the law, is, in legal effect, only an attempt to give operation to the statute of limitations of that state in all the other states of the Union by denying the efficacy of a judgment recovered in another state, for any cause of action which was barred in her tribunals. Such a statute is in derogation of section 1 of article 4 of the federal Constitution, providing that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, and of the legislation enacted in pursuance of that provision.<sup>41</sup>

<sup>39</sup> *Great Western Tel. Co. v. Burnham*, 162 U. S. 339, 16 Sup. Ct. 850, 40 L. Ed. 991; *Metcalf v. Watertown*, 153 U. S. 671, 675, 14 Sup. Ct. 947, 38 L. Ed. 861; *Code Civ. Proc. N. Y.* § 390; *Waterman v. A. & W. Sprague Mfg. Co.*, 55 Conn. 554, 576, 12 Atl. 240; *Sisson v. Niles*, 64 Vt. 449, 24 Atl. 992; *Clarke v. Pierce*, 215 Mass. 552, 102 N. E. 1094, Ann. Cas. 1914D, 421; *Dowse v. Gaynor*, 155 Mich. 38, 118 N. W. 615; *Jaqui v. Benjamin*, 80 N. J. Law, 10, 77 Atl. 468.

<sup>40</sup> *Miller v. Brenham*, 68 N. Y. 83.

<sup>41</sup> *Christmas v. Russell*, 5 Wall. 290, 18 L. Ed. 475.



# CONFLICT OF LAWS

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## 1. INTRODUCTORY

Laws have no force of themselves, beyond the jurisdiction of the nation or state which enacts them, and can have extraterritorial effect only by the comity of other nations or states.<sup>1</sup> Very frequently, however, the courts of a given jurisdiction are called upon to deal with litigations involving questions as to the existence, nature, construction, and effect of the laws of some other jurisdiction, and either to recognize their bearing and their controlling effect, or to hold them unavailing except within the jurisdiction whose laws they are.

Sometimes these questions go to the very heart of the litigation, and involve, according to the answers given thereto, the right to maintain it at all in the jurisdiction selected, while sometimes, where the right to sue in the jurisdiction selected is unassailable or unassailed, the questions raised in respect of the laws of some other state or country relate to the effect thereof; for example, upon the validity or construction of some instrument executed in another state, and upon which the action is based, or the validity of a foreign marriage or divorce, which is either directly or indirectly involved, or the binding effect of a foreign judgment upon which the action is brought, or the enforceability of a cause of action arising under the laws of some other state, and based on facts which would not have given any right to sue if they had happened in the state in which the action is brought.

There are certain kinds of actions which, upon commonly accepted principles, can only be brought in the jurisdiction where the property to be affected by the result is located, or where the transactions or events on which the action or proceeding is based occurred. These cases will be more fully considered hereafter. But the general rule is that, in cases of other than penal actions, the foreign law, if not contrary to the public policy of the state where the action is brought, or to abstract justice or pure morals, or calculated to injure the latter state or its citizens, will be recognized and enforced there, if the court has jurisdiction of all necessary parties, and can see that, consistently with the local forms of procedure and law of trials, it can do substantial justice between the parties. But if the foreign law is a penal statute, or offends the policy of the state, or is repugnant to justice or to good morals, or is calculated to injure the state or its citizens, or if the court has not jurisdiction of parties who must be brought in to enable it to give a satisfactory remedy, or if under the local forms of

<sup>1</sup> *Huntington v. Attrill*, 146 U. S. 657, 669, 13 Sup. Ct. 224, 36 L. Ed. 1123; *Hilton v. Guyot*, 159 U. S. 113, 163, 16 Sup. Ct. 139, 40 L. Ed. 95; *Marshall v. Sherman*, 148 N. Y. 9, 25, 42 N. E. 419, 34 L. R. A. 757, 51 Am. St. Rep. 654.

procedure an action in the state where it is brought cannot give a substantial remedy, the court is at liberty to decline jurisdiction.<sup>2</sup>

"International law in its widest and most comprehensive sense—including not only questions of right between nations, governed by what has been appropriately called the law of nations, but also questions arising under what is usually called private international law, or the conflict of laws, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation—is part of our law, and must be ascertained and administered by the courts of justice as often as such questions are presented in litigation between man and man, duly submitted to their determination. The most certain guide, no doubt, for the decision of such questions, is a treaty or statute of this country; but when \* \* \* there is no written law upon the subject, the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is, whenever it becomes necessary to do so, in order to determine the rights of parties to suits regularly brought before them. In doing this the courts must obtain such aid as they can from judicial decisions, from the works of jurists and commentators, and from the acts and usages of civilized nations."<sup>3</sup>

The foregoing quotation relates to the rights of persons within the territory and dominion of one nation by reason of acts, private or public, done within the dominions of another nation. The same principles would be applicable if for the word "nation" we substituted the word "state," in the sense of one of the United States, except that, under the federal Constitution, certain special provisions render it obligatory upon each state to give effect to certain specified acts done in other states—a subject to be discussed hereafter.

## 2. DEFINITIONS

"*Lex loci rei sitæ*" is the term designating the law of the place where given property is situated. "*Lex loci contractus*" is the law of the place where a given contract is made. "*Lex loci actus*" is "the law of a place where a legal transaction takes place."<sup>4</sup> "*Lex loci solutionis*" is the law of the place where a given contract is to be performed. "*Lex loci domicilii*" is the law of the place where a given person has his domicile. "*Lex fori*" is the law of the place where a given action or proceeding is pending.

<sup>2</sup> *Higgins v. Central N. E. & W. R. Co.*, 155 Mass. 176, 29 N. E. 534, 31 Am. St. Rep. 544; *Midland Co. v. Broat*, 50 Minn. 562, 52 N. W. 972, 17 L. R. A. 312.

<sup>3</sup> *Hilton v. Guyot*, 159 U. S. 113, 163, 16 Sup. Ct. 139, 40 L. Ed. 95.

<sup>4</sup> *Dicey, Conf. Laws*, 74.

### 3. COMITY

As already stated, no law has any effect, of its own force, beyond the limits of the sovereign power from which its authority is derived. The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what has been called the "comity of nations." "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.<sup>5</sup>

#### *Foreign Assignees*

While the statutes of one state can in no case have any force and effect in another state *ex proprio vigore*, and hence the statutory title of foreign assignees in bankruptcy can have no recognition solely by virtue of the foreign statute, yet the comity of nations allows a certain effect to titles derived under, and powers created by, the laws of other countries, and from such comity the titles of foreign statutory assignees are recognized and enforced when that may be done without injustice to the citizens of the state where such recognition is sought, and without prejudice to the rights of creditors pursuing their remedies there under its statutes, and provided such titles are not in conflict with the laws or public policy of the latter state. Subject to these conditions, foreign assignees may appear and maintain suits against debtors of the bankrupt whom they represent, or against others who have interfered with or withhold the property of the bankrupt.<sup>6</sup>

<sup>5</sup> *Hilton v. Guyot*, 159 U. S. 113, 163, 16 Sup. Ct. 139, 40 L. Ed. 95; *Marshall v. Sherman*, 148 N. Y. 9, 25, 42 N. E. 419, 34 L. R. A. 757, 51 Am. St. Rep. 654; *Story, Conf. Laws*, §§ 23, 24, 28, 33, 38; *Saul v. His Creditors*, 5 Mart. N. S. (La.) 569, 596, 16 Am. Dec. 212; *Bank of Augusta v. Earle*, 13 Pet. 519, 589, 10 L. Ed. 274; *Wheat. Int. Law* (8th Ed.) §§ 78, 79, 147; *Olmsted v. Olmsted*, 216 U. S. 386, 30 Sup. Ct. 292, 54 L. Ed. 530, 25 L. R. A. (N. S.) 1292.

<sup>6</sup> *In re Waite*, 99 N. Y. 433, 2 N. E. 440; *Baldwin, Bankruptcy* (3d Ed.) p. 249.

But the title of a foreign assignee to immovables is not recognized in England. *Dacey, Conf. of L.* (2d Ed.) p. 430. So in the United States. *Thomas v. Woods*, 173 Fed. 585, 97 C. C. A. 535, 26 L. R. A. (N. S.) 1180, 19 Ann. Cas. 1080. Nor will such title to personalty be recognized absolutely so as to in-

*Foreign Trustees*

A trustee holding title under an instrument executed in one state or country, by a resident thereof, may sue in another state or country to recover trust property, or damages for conversion, for he has the legal title.<sup>7</sup>

*Foreign Executor or Administrator*

An executor or administrator appointed in one state cannot bring an action in another to enforce claims in favor of the estate, without first taking out letters in the latter. But a voluntary payment to such an administrator is valid.<sup>8</sup>

#### 4. LOCAL AND TRANSITORY ACTIONS

Actions are designated as local or transitory, according as they must, on the one hand, be brought in the jurisdiction where the subject-matter is located, or where the transactions involved occurred, or, on the other hand, may be brought in other jurisdictions whose courts are willing to entertain them.<sup>9</sup> The distinction will be best pointed out by the following statement of the principal illustrations of each class:

#### 5. PENAL PROCEEDINGS ARE LOCAL

Every crime involves the doing of some act by the criminal; every such act must be done at some particular place; and it is there, and there only, that it constitutes a crime, if it is a crime at all; for, if a crime, it is a crime against the sovereignty having jurisdiction over that place.<sup>10</sup> This principle has been briefly expressed as follows:

terfere with domestic creditors. See *Maconchy v. Delehanty*, 11 Ariz. 366, 95 Pac. 109, 17 L. R. A. (N. S.) 173, note, 21 Ann. Cas. 1038.

<sup>7</sup> *Toronto General Trust Co. v. Chicago, B. & Q. R. Co.*, 123 N. Y. 37, 25 N. E. 198; *Bromley v. Mitchell*, 155 Mass. 509, 30 N. E. 83. See *Bingham v. Marine Nat. Bapk*, 112 N. Y. 661, 19 N. E. 416.

<sup>8</sup> *Schluter v. Bowery Sav. Bank*, 117 N. Y. 125, 129, 22 N. E. 572, 5 L. R. A. 541, 15 Am. St. Rep. 494; *Parsons v. Lyman*, 20 N. Y. 103; *Wilkins v. Ellett*, 9 Wall. 740, 19 L. Ed. 586; *Stevens v. Gaylord*, 11 Mass. 256; *Palmer v. Phoenix Mut. Life Insurance Co.*, 84 N. Y. 63, 67.

Foreign executor or administrator may now sue in New York by statute. *Provost v. International Giant Safety Coaster Co.*, 152 App. Div. 83, 136 N. Y. Supp. 654, affirmed 208 N. Y. 635, 102 N. E. 1112.

<sup>9</sup> *Midland Co. v. Broat*, 50 Minn. 562, 52 N. W. 972, 17 L. R. A. 312.

<sup>10</sup> *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123; *Com. v. Pettes*, 114 Mass. 307; *State v. Kelly*, 76 Me. 331, 49 Am. Rep. 620; *U. S. v. Guiteau*, 1 Mackey (D. C.) 498, 47 Am. Rep. 247; *State v. Hall*, 114 N. C. 909, 19 S. E. 602, 28 L. R. A. 59, 41 Am. St. Rep. 822; *Huntington v. Attrill*, [1893] App. Cas. 150.

"The courts of no country execute the penal laws of another."<sup>11</sup> In interpreting this maxim there is danger of being misled by the different shades of meaning allowed to the word "penal" in our language. Strictly and primarily, the words "penal" and "penalty" denote punishment, whether corporal or pecuniary, imposed and enforced by the state, for a crime or offense against its laws.<sup>12</sup> But they are also commonly used as including any extraordinary liability to which the law subjects a wrongdoer, in favor of the person wronged, not limited to the damages suffered, and even as including cases of private contracts wholly independent of statutes, as in the case of the penal sum or penalty of a bond.<sup>13</sup>

The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual. "The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the state, for the recovery of pecuniary penalties for any violation of statutes, for the protection of its revenue, or other municipal laws, and to all judgments for such penalties."<sup>14</sup>

Thus, in the case last cited, it was held that the United States Supreme Court had no original jurisdiction of an action by a state upon a judgment recovered by it in one of its own courts against a citizen of another state, for a pecuniary penalty for a violation of its municipal law. So, the courts of a state cannot be compelled to take jurisdiction of a suit to recover a like penalty for a violation of a law of the United States.<sup>15</sup> So (except in cases removed from a state court in obedience to an express act of Congress, in order to protect rights under the Constitution and laws of the United States), a Circuit Court of the United States cannot entertain jurisdiction of a suit in behalf of the state, to recover a penalty imposed by way of punishment for a violation of a statute of the state.<sup>16</sup> So, again, for the purposes of

<sup>11</sup> *The Antelope*, 10 Wheat. 66, 123, 6 L. Ed. 268. See, also, *Raisor v. Chicago & A. R. Co.*, 215 Ill. 47, 74 N. E. 69, 106 Am. St. Rep. 153, 2 Ann. Cas. 802; *Scoville v. Canfield*, 14 Johns. (N. Y.) 338, 7 Am. Dec. 467.

<sup>12</sup> *U. S. v. Reisinger*, 128 U. S. 398, 402, 9 Sup. Ct. 99, 32 L. Ed. 480; *U. S. v. Chouteau*, 102 U. S. 603, 611, 26 L. Ed. 246.

<sup>13</sup> *Huntington v. Attrill*, 146 U. S. 657, 667, 13 Sup. Ct. 224, 36 L. Ed. 1123.

<sup>14</sup> *Wisconsin v. Pelican Insurance Co.*, 127 U. S. 265, 290, 8 Sup. Ct. 1370, 32 L. Ed. 239; *Gulledge Bros. Lumber Co. v. Wenatchee Land Co.*, 122 Minn. 266, 142 N. W. 305, 46 L. R. A. (N. S.) 697.

<sup>15</sup> *Martin v. Hunter's Lessee*, 1 Wheat. 304, 330, 337, 4 L. Ed. 97; *U. S. v. Lathrop*, 17 Johns. (N. Y.) 4; *Ely v. Peck*, 7 Conn. 239; *State v. Pike*, 15 N. H. 83, 85; *Ward v. Jenkins*, 10 Metc. (Mass.) 583, 587.

<sup>16</sup> *Gwin v. Breedlove*, 2 How. 29, 36, 37, 11 L. Ed. 167; *Gwin v. Barton*, 6 How. 7, 12 L. Ed. 321; *Iowa v. Chicago, B. & Q. R. Co.* (C. C.) 37 Fed. 497.



extraterritorial jurisdiction it has been held that actions by a common informer to recover a penalty imposed by statute for an offense against the law, and which may be barred by a pardon granted before action brought, may stand on the same ground as suits brought for such a penalty in the name of the state or its officers.<sup>17</sup> And personal disabilities imposed by the law of a state as an incident or consequence of a judicial sentence or decree, by way of punishment of an offender, and not for the benefit of any other person—such as attainder, or infamy, or incompetency of a convict to testify, or disqualification of the guilty party to a cause of divorce to marry again—are strictly penal, and therefore have no extraterritorial operation.<sup>18</sup>

On the other hand, if the statute of one state makes a person or corporation, whose wrongful act, neglect, or default should cause the death of any person, liable to an action by his administrator, for the benefit of his widow and next of kin, to recover damages for the pecuniary injury resulting to them from his death, such an action, where the death has taken place in that state, may, upon general principles of law, be maintained in a federal Circuit Court held in another state, by an administrator of the deceased appointed in that state; for, although the remedy is statutory, the action is merely to recover damages for a civil injury, and may be maintained without regard to whether a similar liability would have attached for a similar cause in the state in which the federal court is held.<sup>19</sup> This principle has been adopted in several states.<sup>20</sup> So, a state statute making the officers of a corporation, who sign and record a false certificate of the amount of its capital stock, liable for all its debts, is not, in the international sense, a criminal or quasi criminal law.<sup>21</sup>

<sup>17</sup> *Adams v. Woods*, 2 Cranch, 336, 2 L. Ed. 297; *U. S. v. Connor*, 138 U. S. 61, 66, 11 Sup. Ct. 229, 34 L. Ed. 860; *Bryant v. Ela, Smith* (N. H.) 396.

<sup>18</sup> *Folliott v. Ogden*, 1 H. Bl. 123, 3 Term R. 726; *Logan v. U. S.*, 144 U. S. 263, 303, 12 Sup. Ct. 617, 36 L. Ed. 429; *Dickson v. Dickson's Heirs*, 1 Yerg. (Tenn.) 110, 24 Am. Dec. 444; *Com. v. Lane*, 113 Mass. 458, 471, 18 Am. Rep. 509; *Van Voorhis v. Brintnall*, 86 N. Y. 18, 28, 29, 40 Am. Rep. 505.

<sup>19</sup> *Dennick v. Central R. Co. of New Jersey*, 103 U. S. 11, 26 L. Ed. 439; *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 605, 12 Sup. Ct. 905, 36 L. Ed. 829.

<sup>20</sup> *Herrick v. Minneapolis & St. L. Ry. Co.*, 31 Minn. 11, 16 N. W. 413, 47 Am. Rep. 771; *Chicago, St. L. & N. O. R. Co. v. Doyle*, 60 Miss. 977; *Knight v. West Jersey R. Co.*, 108 Pa. 250, 56 Am. Rep. 200; *Morris v. Chicago, R. I. & P. Ry. Co.*, 65 Iowa, 727, 23 N. W. 143, 54 Am. Rep. 39; *Higgins v. Central N. E. & W. R. Co.*, 155 Mass. 176, 29 N. E. 534, 31 Am. St. Rep. 544.

But in some states the laws of both jurisdictions must be similar. *Wooden v. Western N. Y. & P. R. Co.*, 126 N. Y. 10, 26 N. E. 1050, 13 L. R. A. 458, 22 Am. St. Rep. 803; *Hyde v. St. Louis & P. Ry. Co.*, 61 Iowa, 441, 16 N. W. 351, 47 Am. Rep. 820; *Ash v. Baltimore & O. R. Co.*, 72 Md. 144, 19 Atl. 643, 20 Am. St. Rep. 461.

<sup>21</sup> *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123.

The question whether, in a given case, a law is penal, and an action based thereon is therefore local, or is nonpenal, and the action therefore maintainable in other jurisdictions is to be determined, not by the name applied to it by the Legislature which enacted it, nor by the construction placed upon it by the courts of that jurisdiction, but by the principles of international law, applied by the court appealed to for its enforcement in another state or country. If the suit is originally brought in a federal Circuit Court, that court must, in the first instance, decide the question itself, uncontrolled by local decisions.<sup>22</sup> If a suit on the original liability under the statute of one state is brought in a court of another state, the Constitution and laws of the United States have not authorized its decision upon such a question to be reviewed by the federal Supreme Court.<sup>23</sup> But if the original liability has passed into judgment in one state, the courts of another state, when asked to enforce it, are bound by the Constitution and laws of the United States to give full faith and credit to that judgment, and if they do not their decision may be reviewed by the federal Supreme Court on writ of error.<sup>24</sup> And that court, in order to determine whether full faith and credit was given to the judgment sued on, must determine for itself whether the original cause of action is penal in the international sense; for, if so, the mere fact of putting it in the form of a judgment does not change its essential nature and real foundation, and so the judgment is entitled to no more credit in another state than would have been the original cause of action.<sup>25</sup>

## 6. ACTIONS IN REM TO DETERMINE LAND TITLES

Proceedings in rem to determine the title to land must be brought in the state within whose borders the land lies.<sup>26</sup>

## 7. DAMAGES FOR TRESPASSES TO REAL ESTATE

Whether actions to recover pecuniary damages for trespasses to real estate, "of which the causes could not have occurred elsewhere than where they did occur,"<sup>27</sup> are purely local, or may be brought in another jurisdiction, depends upon the question whether they are

<sup>22</sup> *Burgess v. Seligman*, 107 U. S. 20, 33, 2 Sup. Ct. 10, 27 L. Ed. 359.

<sup>23</sup> *New York Life Ins. Co. v. Hendren*, 92 U. S. 286, 23 L. Ed. 709.

<sup>24</sup> *Green v. Van Buskirk*, 5 Wall. 307, 311, 18 L. Ed. 599; *Crapo v. Kelly*, 16 Wall. 610, 619, 21 L. Ed. 430; *Carpenter v. Strange*, 141 U. S. 87, 103, 11 Sup. Ct. 960, 35 L. Ed. 640.

<sup>25</sup> *Huntington v. Attrill*, 146 U. S. 657, 683, 13 Sup. Ct. 224, 36 L. Ed. 1123; *Huntington v. Attrill*, [1893] App. Cas. 150.

<sup>26</sup> *Huntington v. Attrill*, 146 U. S. 657, 669, 13 Sup. Ct. 224, 36 L. Ed. 1123.

<sup>27</sup> *Westl. Priv. Int. Law*, p. 13.

viewed as relating to the real estate or only as affording a personal remedy.<sup>28</sup> By the common law of England, adopted in most of the states of the Union, such actions are regarded as local, and can be brought only where the land is situated.<sup>29</sup> But in some states and countries they are regarded as transitory, like other personal actions; and whether an action for trespass to land in one state can be brought in another state depends on the view which the latter state takes of the nature of the action. For instance, Chief Justice Marshall held that an action could not be maintained in Virginia, by whose law it was local, for a trespass to land in Louisiana.<sup>30</sup> On the other hand, an action for a trespass to land in Illinois, where the rule of the common law prevailed, was maintained in Louisiana.<sup>31</sup>

## 8. INJURIES TO PERSONS OR TO MOVABLE PROPERTY

In order to maintain an action for an injury to the person or to movable property, some courts have held that the wrong must be one which would be actionable by the law of the place where the redress is sought, as well as by the law of the place where the wrong was done;<sup>32</sup> while in others, including the federal courts, a private action may be maintained in one state, if not contrary to its own policy, for such a wrong done in another, and actionable there, although a like wrong would not be actionable in the state where the suit is brought.<sup>33</sup>

<sup>28</sup> *Huntington v. Attrill*, 146 U. S. 657, 669, 13 Sup. Ct. 224, 36 L. Ed. 1123.

<sup>29</sup> *Ellenwood v. Marietta Chair Co.*, 158 U. S. 105, 15 Sup. Ct. 771, 39 L. Ed. 913; *American Union Tel. Co. v. Middleton*, 80 N. Y. 408; *Doulson v. Matthews*, 4 Term R. 503; *McKenna v. Fisk*, 1 How. 241, 248, 11 L. Ed. 117. The rule in New York was changed by statute in 1913. Code Civ. Proc. § 982a.

<sup>30</sup> *Livingston v. Jefferson*, 1 Brock. 203, Fed. Cas. No. 8,411.

<sup>31</sup> *Holmes v. Barclay*, 4 La. Ann. 63. See, also, *Companhia de Mocambique v. British South Africa Co.*, [1892] 2 Q. B. 358; *Cragin v. Lovell*, 88 N. Y. 258; *Allin v. Connecticut River Lumber Co.*, 150 Mass. 560, 23 N. E. 581, 6 L. R. A. 416.

<sup>32</sup> *The Halley*, L. R. 2 P. C. 193, 204; *Phillips v. Eyre*, L. R. 6 Q. B. 1, 28, 29; *The M. Moxham*, 1 Prob. Div. 107, 111; *Wooden v. Western N. Y. & P. R. Co.*, 126 N. Y. 10, 26 N. E. 1050, 13 L. R. A. 458, 22 Am. St. Rep. 803; *Ash v. Baltimore & O. R. Co.*, 72 Md. 144, 19 Atl. 643, 20 Am. St. Rep. 461.

<sup>33</sup> *Smith v. Condry*, 1 How. 28, 11 L. Ed. 35; *The China*, 7 Wall. 53, 64, 19 L. Ed. 67; *The Scotland*, 105 U. S. 24, 29, 26 L. Ed. 1001; *Dennick v. Central R. Co. of New Jersey*, 103 U. S. 11, 26 L. Ed. 439; *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829; *Walsh v. New York & N. E. R. Co.*, 160 Mass. 571, 36 N. E. 584, 39 Am. St. Rep. 514. Compare *Anderson v. Milwaukee & St. P. Ry. Co.*, 37 Wis. 321; *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48, 38 Am. Rep. 491.

## 9. ACTIONS ON CONTRACT

As a general proposition, an action to recover damages for the breach of a contract, or specific performance of its terms, is transitory.<sup>34</sup>

## 10. LOCALITY IN EQUITY SUITS

In suits in equity the situation presented is somewhat different from that in actions at law; for "where the subject-matter is situated within another country or state, but the parties are within the jurisdiction of the court, any suit may be maintained and remedy granted which directly affect and operate upon the person of the defendant, and not upon the subject-matter, although the subject-matter is referred to in the decree, and the defendant is ordered to do or refrain from certain acts towards it, and it is thus ultimately, but indirectly, affected by the relief granted."<sup>35</sup>

Pomeroy mentions, as examples of this rule, suits for specific performance, relief on the ground of fraud, final accounting, settlement of partnerships, and the like. So, where an action is brought, for example, in Connecticut, upon a New York judgment, although the judgment sued on cannot be attacked in that action, on the ground that it was procured by fraud, yet the defendant may file a bill in equity against the plaintiff, alleging that the judgment was procured by fraud, and, upon establishing his allegations, procure a decree enjoining the plaintiff from prosecuting the action upon it. And in such a case if an action is subsequently brought upon the original judgment, in New York, where it was originally rendered, the decision of the Connecticut court that it had been obtained by fraud would be conclusive in New York against its validity.<sup>36</sup> So, the courts of a state have power, in a suit in equity, to set aside a judgment or decree obtained by fraud, although it was obtained in a United States court.<sup>37</sup>

Although in cases of trust, of contract, and of fraud, the jurisdiction of a court of chancery may be sustained over the person, notwithstand-

<sup>34</sup> *Midland Co. v. Broat*, 50 Minn. 562, 52 N. W. 972, 17 L. R. A. 312; *Higgins v. Central N. E. & W. R. Co.*, 155 Mass. 176, 29 N. E. 534, 31 Am. St. Rep. 544.

<sup>35</sup> 3 Pom. Eq. Jur. § 1318; *Davis v. Cornue*, 151 N. Y. 172, 178, 45 N. E. 449; *Dobson v. Pearce*, 12 N. Y. 156, 62 Am. Dec. 152; *Stevens v. Central Nat. Bank of Boston*, 144 N. Y. 50, 39 N. E. 68.

<sup>36</sup> *Dobson v. Pearce*, 12 N. Y. 156, 62 Am. Dec. 152.

<sup>37</sup> *Stevens v. Central Nat. Bank of Boston*, 144 N. Y. 50, 39 N. E. 68. See, also, *Bunbury v. Bunbury*, 1 Beav. 318; *Beckford v. Kemble*, 1 Sim. & S. 7; *Wedderburn v. Wedderburn*, 2 Beav. 208; *Jones v. Geddes*, 1 Phil. 724.

ing lands not within the jurisdiction may be affected by the decree,<sup>38</sup> yet it does not follow that such decree is in itself necessarily binding upon the courts of the state where the land is situated. Thus, if the court of a state in which land is not situated, instead of directing a conveyance or in some way exerting control over the party, in order thereby to effectuate its decision, merely adjudicates upon the title, the courts of the state where the land lies are not obliged thereby to surrender jurisdiction to the court rendering the decree, by acceding to its decision.<sup>39</sup>

## 11. WHAT LAW GOVERNS CONTRACTS

### (a) *Contracts Relating to "Movables"*

It is a general and universal rule that personal property has no locality. It is subject to the law of the owner's domicile, as well in respect to a disposition of it by act inter vivos as its transmission by last will and testament, and by succession upon an owner dying intestate.<sup>40</sup>

This rule proceeds on the fiction of law that the domicile draws to it the personal estate of the owner, wherever it may happen to be. But this fiction is by no means of universal application, and yields whenever it is necessary, for the purposes of justice, that the actual situs of the thing should be examined, and always yields when the law and policy of the state where the property is located have prescribed a different rule of transfer from that of the state where the owner lives; and to this effect are all the authorities.<sup>41</sup> Thus, a general assignment for the benefit of creditors, which is operative in New York, as to property situated in that state, cannot operate in another state to pass title to the property in contravention of the laws of that state.<sup>42</sup>

So, while the validity of a disposition of personal property at the domicile of the owner is generally the test of its validity in other jurisdictions, the rule only requires compliance with forms and with principles of law, general or universal, recognized as essential to the trans-

<sup>38</sup> *Massie v. Watts*, 6 Cranch, 148, 3 L. Ed. 181.

<sup>39</sup> *Carpenter v. Strange*, 141 U. S. 87, 106, 11 Sup. Ct. 960, 35 L. Ed. 640; *Davis v. Headley*, 22 N. J. Eq. 115; *Miller v. Birdsong*, 7 Baxt. (Tenn.) 531; *Cooley v. Scarlett*, 38 Ill. 316, 87 Am. Dec. 298; *Gardner v. Ogden*, 22 N. Y. 327, 78 Am. Dec. 192.

<sup>40</sup> *Cross v. United States Trust Co., of New York*, 131 N. Y. 330, 339, 30 N. E. 125, 15 L. R. A. 606, 27 Am. St. Rep. 597; *Martyne v. American Union Fire Ins. Co. of Philadelphia*, 216 N. Y. 183, 110 N. E. 502.

<sup>41</sup> *Warner v. Jaffray*, 96 N. Y. 248, 255, 48 Am. Rep. 616; *Green v. Van Buskirk*, 7 Wall. 139, 19 L. Ed. 109; *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664, 23 L. Ed. 1003.

<sup>42</sup> *Warner v. Jaffray*, 96 N. Y. 248, 48 Am. Rep. 616.

fer or transmission of property. If personal property is disposed of by will, in trust for charity, to take effect in another country, no good reason is apparent for insisting that a full compliance with the local law of the domicile with respect to the form or duration of the trust, or the definition of the beneficiaries, is necessary to the validity of the disposition. Such laws are not generally regarded as limitations upon the power of the owner to transfer or transmit the property, but regulations applicable to the holding of property in a particular community, founded upon political or social considerations. Thus, a disposition of personal property made in New York by a competent testator, in a valid testamentary instrument, to trustees in a foreign country, for the purpose of a charity to be established in that country, is valid, although not in compliance with the New York statute or the rules of law in force there in regard to trusts, providing it is valid by the law of the place where the gift is to take effect, and which governs the trustee and the property when transmitted there.<sup>43</sup>

(b) *Conditional Sales*

Where a chattel is sold under a contract executed in another state, whereby the vendor retains the legal title until the price is paid, the law of the state where the contract was made will ordinarily govern the rights of the parties.<sup>44</sup>

But where a conditional sale is made in one state, but contemplates or provides that the property is to be delivered or used in another state, the construction and validity of the contract is to be determined by the law of the latter state.<sup>45</sup>

(c) *Contracts Relating to "Immovables"*

"It is a principle firmly established that to the law of the state in which the land is situated we must look for the rules which govern its

<sup>43</sup> *Hope v. Brewer*, 136 N. Y. 126, 139, 32 N. E. 558, 18 L. R. A. 458; *Cross v. United States Trust Co. of New York*, 131 N. Y. 330, 30 N. E. 125, 15 L. R. A. 606, 27 Am. St. Rep. 597; *Burbank v. Whitney*, 24 Pick. (Mass.) 154, 35 Am. Dec. 312; *Fordyce v. Bridges*, 2 Phil. Ch. 497; *Vansant v. Roberts*, 3 Md. 119. See, also, in general, as to contracts valid where made, and also where the movable property is situated, and the recognition of their validity elsewhere, *Cleveland Mach. Works v. Lang*, 67 N. H. 348, 31 Atl. 20, 68 Am. St. Rep. 675; *Offutt v. Flagg*, 10 N. H. 46; *Weinstein v. Freyer*, 93 Ala. 257, 9 South. 285, 12 L. R. A. 700.

<sup>44</sup> *Barrett v. Kelley*, 66 Vt. 515, 29 Atl. 809, 44 Am. St. Rep. 862; *Cobb v. Buswell*, 37 Vt. 337; *Holt v. Knowlton*, 86 Me. 456, 29 Atl. 1113; *Cleveland Mach. Works v. Lang*, 67 N. H. 348, 31 Atl. 20, 68 Am. St. Rep. 675; *Marvin Safe Co. v. Norton*, 48 N. J. Law, 410, 7 Atl. 418, 57 Am. Rep. 566; *Lane v. J. E. Roach's Banda Mexicana Co.*, 78 N. J. Eq. 439, 79 Atl. 365.

<sup>45</sup> *In re Wall* (D. C.) 207 Fed. 994; *Cable Co. v. McElhoe*, 58 Ind. App. 637, 108 N. E. 790.

possession, alienation, and transfer, and for the effect and construction of wills.”<sup>46</sup> Thus, for example, where an action in the federal courts involves the application of the rule in *Shelley's Case* the court is relieved from the consideration of the innumerable cases in which the courts in England and in the several states of the Union have dealt with its origin and application, and has only to do with the rule as expounded and applied by the courts of the state in which the land lies.<sup>47</sup>

The rule which subjects a contract made in one state concerning land in another state to the law of the place where the land is situated is not confined in its operation to the formal execution of the deed, but extends to and includes all questions as to its construction and interpretation.<sup>48</sup> Not only must resort be had to the law of the site, to determine the construction and legal effect of a deed, but also to determine whether the subject-matter of the instrument is real or personal.<sup>49</sup> The question, being one of foreign law, must be determined by the court upon the evidence presented, in the same manner as any other question of fact.<sup>50</sup>

The true rule to follow, in cases depending on the law of a particular state, is to adopt the construction which the courts of that state have given to those laws.<sup>51</sup> Thus, a testator domiciled in New York devised land in another state to his executors, in trust, with power to collect the rents and profits, sell the land in their discretion, and reinvest the proceeds, as they might deem advisable. The trustees were directed to pay over to the beneficiaries the rents and profits, “and all net proceeds of sales, made pursuant to the authority so given them, which they shall deem inadvisable to reinvest.” Testator then “gave, devised, and bequeathed” all the property of which the trustees had received the rents and profits, and all the residue of his property, “in

<sup>46</sup> *De Vaughn v. Huchinson*, 165 U. S. 566, 17 Sup. Ct. 461, 41 L. Ed. 827; *U. S. v. Crosby*, 7 Cranch, 115, 3 L. Ed. 287; *Dicey, Confl. of L.* (2d Ed.) ch. XXII.

<sup>47</sup> *De Vaughn v. Huchinson*, 165 U. S. 566, 570, 17 Sup. Ct. 461, 41 L. Ed. 827.

<sup>48</sup> *Genet v. President, etc., of Delaware & H. Canal Co.*, 13 Misc. Rep. 409, 421, 35 N. Y. Supp. 147; *McGoon v. Scales*, 9 Wall. 23, 19 L. Ed. 545. But see *Dicey, Confl. of L.* (2d Ed.) p. 510.

<sup>49</sup> *Genet v. President, etc., of Delaware & H. Canal Co.*, 13 Misc. Rep. 409, 421, 35 N. Y. Supp. 147; *Chapman v. Robertson*, 6 Paige (N. Y.) 627, 630, 31 Am. Dec. 264; *Holbrook v. Bowman*, 62 N. H. 313; *Bronson v. St. Croix Lumber Co.*, 44 Minn. 348, 46 N. W. 570.

<sup>50</sup> *Genet v. President, etc., of Delaware & H. Canal Co.*, 13 Misc. Rep. 409, 421, 35 N. Y. Supp. 147; *Monroe v. Douglass*, 5 N. Y. 447; *Kline v. Baker*, 99 Mass. 254; *Concha v. Murrieta*, 40 Ch. Div. 543.

<sup>51</sup> *Elmendorf v. Taylor*, 10 Wheat. 152, 159, 6 L. Ed. 289.

such manner that the parties, theretofore receiving the income only, shall receive and become vested with the estate and property out of which such income arose." And it was held that, though the trustees sold the land under the power, and brought the proceeds into New York without reinvesting them, such proceeds retained the character of realty, and the testamentary disposition thereof was governed by the law of the state in which the land was situated.<sup>52</sup>

The doctrine applies not merely to what is actually immovable, but to what may be deemed to partake of an immovable or real nature by the law of the locality. Servitudes, easements, rents, and other incorporeal hereditaments and interests in, and appurtenances to, land, come within the legal definition of "land," as subject to the *lex loci rei sitæ*.<sup>53</sup>

## 12. LEX LOCI REI SITÆ

In addition to the principles elsewhere stated as to the controlling effect of the law of the site in respect to contracts, deeds, assignments, and other transactions affecting immovable property, that law exclusively governs the descent and heirship of real property. No persons can take by descent unless recognized as legitimate heirs by the law of the country or state where the land lies.<sup>54</sup> The same principle applies to devises of real property.<sup>55</sup>

Other illustrations, and further discussion, of the law of the site, both with regard to movable and immovable property, will be found under other heads, where for convenience it is treated by way of comparison or contrast, with the law of the forum, of the place of the contract, etc.

## 13. LEX LOCI CONTRACTUS

An instrument, as to its form and the formalities attending its execution, must be tested by the law of the place where it is made.<sup>56</sup> Such is the usual statement of the general rule, and yet upon the question by what law the execution, interpretation, and validity of a contract is to be determined there are different theories when a contract

<sup>52</sup> *Butler v. Green*, 65 Hun, 99, 19 N. Y. Supp. 890.

<sup>53</sup> *Butler v. Green*, 65 Hun, 99, 19 N. Y. Supp. 890, 894; *Levy v. Levy*, 33 N. Y. 97.

<sup>54</sup> *Williams v. Kimball*, 35 Fla. 49, 16 South. 783, 26 L. R. A. 746, 48 Am. St. Rep. 238; *Boyce v. City of St. Louis*, 29 Barb. (N. Y.) 650; *Dawes v. Boylston*, 9 Mass. 337, 6 Am. Dec. 72; *Potter v. Titcomb*, 22 Me. 300; *Duncan v. Lawson*, 41 Ch. Div. 394.

<sup>55</sup> *Guarantee Trust & Safe Deposit Co. v. Maxwell* (N. J. Ch.) 30 Atl. 339.

<sup>56</sup> *Miller v. Wilson*, 146 Ill. 523, 34 N. E. 1111, 37 Am. St. Rep. 186; *Roubicek v. Haddad*, 67 N. J. Law, 522, 51 Atl. 938; *Union Nat. Bank of Chicago*



is made in one place and to be performed in another. Thus, in *Scudder v. Union Nat. Bank*,<sup>57</sup> it is said that "matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made; matters connected with its performance are regulated by the law prevailing at the place of performance; matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statute of limitation, depend upon the law of the place where the suit is brought." In that case it was held that the validity of an acceptance in Chicago, by a member of an Illinois firm, of a bill of exchange, drawn in Chicago upon the firm, was to be determined by the law of Illinois.<sup>58</sup>

In the *Liverpool & G. W. Steam Co. Case*, it is said that a review of the principal cases demonstrates that, according to the great preponderance, if not the uniform concurrence, of authority, the general rule that the nature, the obligation, and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view,<sup>59</sup> requires a contract of affreightment made in one country, between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country,<sup>60</sup> unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other country.<sup>61</sup>

But, as already stated, the parties may contract with reference to the law of the state where the contract is to be performed, and in such case its validity and interpretation are to be determined according to the law of the latter place.<sup>62</sup> Thus, if the interest allowed by the laws of the place of performance is higher than that permitted at the place of the contract, the parties may stipulate for the higher interest with-

*v. Chapman*, 169 N. Y. 538, 62 N. E. 672, 57 L. R. A. 513, 88 Am. St. Rep. 614.

<sup>57</sup> 91 U. S. 406, 412, 23 L. Ed. 245.

<sup>58</sup> See, also, *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 453, 9 Sup. Ct. 469, 32 L. Ed. 788; *Oliphant v. Vannest*, 58 N. J. Law, 162, 33 Atl. 382; *Northern Pac. Ry. Co. v. Wall*, 241 U. S. 87, 36 Sup. Ct. 493, 60 L. Ed. 905; *Reilly v. Steinhart*, 217 N. Y. 549, 112 N. E. 468; *Hinkly v. Freick*, 86 N. J. Law, 281, 90 Atl. 1108, L. R. A. 1916B, 1041.

<sup>59</sup> *Hamlyn v. Talisker Distillery*, [1894] App. Cas. 202.

<sup>60</sup> *Taylor v. Sharp*, 108 N. C. 377, 13 S. E. 138.

<sup>61</sup> See, as to promissory notes, *McGarry v. Nicklin*, 110 Ala. 559, 17 South. 726, 55 Am. St. Rep. 40; *Case v. Dodge*, 18 R. I. 661, 29 Atl. 785; *Fish v. Delaware, L. & W. R. Co.*, 211 N. Y. 374, 105 N. E. 661.

<sup>62</sup> *In re Missouri S. S. Co.*, 42 Ch. Div. 321; *Davis v. Ætna Mut. Ins. Co.*, 67 N. H. 218, 34 Atl. 464; *Hart v. Livermore Foundry & Machine Co.*, 72 Miss. 809, 828, 17 South. 769; *International Harvester Co. of America v. McAdam*, 142 Wis. 114, 124 N. W. 1042, 26 L. R. A. (N. S.) 774, 20 Ann. Cas. 614.

out incurring the penalty of usury;<sup>63</sup> though, if a promissory note is made, for example, in New York, by a resident of that state, and payable within the state, and intended to be discounted there, and no rate of interest is mentioned, and it is in fact discounted in another state, at a rate of interest valid according to the laws of the latter state, but in excess of the rate allowed in New York, it is invalid;<sup>64</sup> and if a draft made in one state, by parties residing there, is payable in another, where the drawee resides, the law of the latter state, in respect to presentation and demand for payment, is controlling.<sup>65</sup>

In New York it is held that the *lex loci solutionis* and the *lex loci contractus* must both be taken into consideration, neither, of itself, being conclusive, but the two must be considered in connection with the whole contract, and the circumstances under which the parties acted, in determining the question of their intent.<sup>66</sup> In some states it is held that, in the absence of a contrary intention, when a contract is made in one place or country, to be performed in another, its validity and effect are to be determined by the law of the place of performance.<sup>67</sup>

If a stipulation in a contract with a common carrier, relieving the carrier from liability for injuries resulting from the negligence of its servants, is valid where made, it will be enforced, and, if void there, will not be enforced, on principles of comity, in another jurisdiction, although contrary to its own local policy.<sup>68</sup>

<sup>63</sup> *Andrews v. Pond*, 13 Pet. 65, 10 L. Ed. 61; *London Assurance v. Companhia de Moagens Do Barreiro*, 167 U. S. 149, 161, 17 Sup. Ct. 785, 42 L. Ed. 113.

It will be presumed that the parties chose the law of that state whose law would make the contract valid. *Dygert v. Vermont Loan & Trust Co.*, 94 Fed. 913, 37 C. C. A. 389; *U. S. Savings & Loan Co. v. Shain*, 8 N. D. 136, 77 N. W. 1006.

<sup>64</sup> *Dickinson v. Edwards*, 77 N. Y. 573, 33 Am. Rep. 671.

<sup>65</sup> *Sylvester v. Crohan*, 138 N. Y. 494, 34 N. E. 273. See *Douglas v. Bank of Commerce*, 97 Tenn. 133, 36 S. W. 874; *Abt v. American Trust & Savings Bank*, 159 Ill. 467, 42 N. E. 856, 50 Am. St. Rep. 175.

<sup>66</sup> *Wilson v. Lewiston Mill Co.*, 150 N. Y. 314, 323, 44 N. E. 959, 55 Am. St. Rep. 680.

<sup>67</sup> *Burnett v. Pennsylvania R. Co.*, 176 Pa. 45, 34 Atl. 972; *Abt v. American Trust & Savings Bank*, 159 Ill. 467, 42 N. E. 856, 50 Am. St. Rep. 175.

<sup>68</sup> *O'Regan v. Cunard Steamship Co.*, 160 Mass. 356, 361, 35 N. E. 1070, 39 Am. St. Rep. 484; *Davis v. Chicago, M. & St. P. Ry. Co.*, 93 Wis. 470, 480, 67 N. W. 16, 1132, 33 L. R. A. 654, 57 Am. St. Rep. 935; *Fonseca v. Cunard Steamship Co.*, 153 Mass. 553, 27 N. E. 665, 12 L. R. A. 340, 25 Am. St. Rep. 660; *Brockway v. American Express Co.*, 168 Mass. 257, 47 N. E. 87. So, as to telegrams, *Reed v. Western Union Telegraph Co.*, 135 Mo. 661, 37 S. W. 904, 34 L. R. A. 492, 58 Am. St. Rep. 609. Otherwise, in the federal courts, *The Iowa* (D. C.) 50 Fed. 561; even though the parties stipulate to be governed by the foreign law, *The Energia* (D. C.) 56 Fed. 124; *Lewisohn v. National Steamship Co.* (D. C.) 56 Fed. 602. Upon the question of when it is

## 14. DEFENSES AND DISCHARGES

The general rule, as stated by Story, is that a defense or discharge, good by the law of the place where the contract is made or is to be performed, is to be of equal validity in every other place where the question may come to be litigated.<sup>69</sup> Thus, infancy, if a valid defense by the *lex loci contractus*, will be a valid defense everywhere.<sup>70</sup> The tender and refusal, good by the same law, either as a full discharge or as a present fulfillment of the contract, will be respected everywhere.<sup>71</sup> Payment in paper money, bills, or in other things, if good by the same law, will be deemed a sufficient payment everywhere.<sup>72</sup>

And, on the other hand where a payment by negotiable bills or notes is by the *lex loci contractus* held to be a conditional payment only, it will be so held, even in states where such payment under the domestic law would be held absolute. So, if, by the law of the place of the contract, equitable defenses are allowed in favor of the maker of a negotiable note, any subsequent indorsement will not change his rights in regard to the holder. The latter must take it *cum onere*.<sup>73</sup>

## 15. THE LAW OF THE PLACE OF PERFORMANCE

In every forum, a contract is governed by the law with a view to which it was made.<sup>74</sup> The law of the place where a contract is made can never be the rule where the transaction is entered into with an express view of adopting the law of another country as the rule by which it is to be governed.<sup>75</sup> It is upon this ground that the presumption rests that the contract is to be performed at the place where it is made, and to be governed by its laws, where there is nothing in its terms, or in the explanatory circumstances of its execution, inconsis-

that a contract, as, for example, an insurance policy, becomes complete, so as to determine the "place of the contract," see *Curnow v. Phoenix Ins. Co.*, 37 S. C. 406, 16 S. E. 132, 34 Am. St. Rep. 766; *Equitable Life Assur. Soc. v. Clements*, 140 U. S. 226, 11 Sup. Ct. 822, 35 L. Ed. 497. See *Fish v. Delaware, L. & W. R. Co.*, note 61, ante.

<sup>69</sup> Story, *Conf. Laws*, § 331; *Ainsinck v. Rogers*, 189 N. Y. 252, 82 N. E. 134, 12 L. R. A. (N. S.) 875, 121 Am. St. Rep. 858, 12 Ann. Cas. 450.

<sup>70</sup> *Thompson v. Ketchum*, 8 Johns. (N. Y.) 189, 5 Am. Dec. 332; *Male v. Roberts*, 3 Esp. 163.

<sup>71</sup> *Warder v. Arell*, 2 Wash. (Va.) 282, 1 Am. Dec. 488.

<sup>72</sup> *Searight v. Calbraith*, 4 Dall. 325, 1 L. Ed. 853.

<sup>73</sup> *Evans v. Gray*, 12 Mart. O. S. (La.) 475; Story, *Conf. Laws*, § 332.

<sup>74</sup> *Pritchard v. Norton*, 106 U. S. 124, 136, 1 Sup. Ct. 102, 27 L. Ed. 104.

<sup>75</sup> *Robinson v. Bland*, 2 Burrows, 1077, 1078; *Le Breton v. Miles*, 8 Paige (N. Y.) 261.

ent with that intention. It is the will of the contracting parties, and not the law, which fixes the place of fulfillment.<sup>76</sup>

But if no place is designated, the place of sale is the point at which goods ordered or purchased are set apart and delivered to the purchaser.<sup>77</sup> "Matters connected with the performance of a contract are regulated by the law prevailing at the place of the performance."<sup>78</sup> The rule that the obligation of shippers of a cargo is to be determined by the law of the place where the contract of affreightment was made<sup>79</sup> disposes of any theory that the question can be affected by the "law of the flag." The fact that the vessel, for instance, was Italian, does not subject the contract of shipment to the operation of the Italian Commercial Code.<sup>80</sup>

### *Interest*

The general proposition is that where a promissory note or other obligation for the payment or forbearance of money is made in one state, and payable in another, the parties may voluntarily agree upon a rate of interest allowed by the laws either of the state where the obligation is made, or by the laws of the state where it is made payable. If a party goes into another state, and there makes an agreement with a citizen of that state for the loan or forbearance of money, lawful by the laws of that state, he does not render his obligation void by making it payable in another state, under whose laws the contract would be usurious. Neither can it be claimed that, because the obligation, instead of being signed in the state where the contract was made, is signed in another state, and sent by mail to the place of the contract, it must be governed by the local laws of the place where it was signed.<sup>81</sup>

<sup>76</sup> 4 Phillim. Int. Law, 469, 470. See, also, *Meyer v. Richards*, 163 U. S. 385, 16 Sup. Ct. 1148, 41 L. Ed. 199.

<sup>77</sup> *Perlman v. Sartorius*, 162 Pa. 320, 29 Atl. 852, 42 Am. Rep. 834.

<sup>78</sup> *Waverly Nat. Bank v. Hall*, 150 Pa. 466, 473, 24 Atl. 665, 30 Am. St. Rep. 823; *Scudder v. Union Nat. Bank*, 91 U. S. 406, 23 L. Ed. 245; *Pritchard v. Norton*, 106 U. S. 124, 1 Sup. Ct. 102, 27 L. Ed. 104; *Union Nat. Bank of Chicago v. Chapman*, 169 N. Y. 538, 62 N. E. 672, 57 L. R. A. 513, 88 Am. St. Rep. 614; *Dacey, Conf. of L.* (2d Ed.) pp. 543, 553.

<sup>79</sup> *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788.

<sup>80</sup> *China Mut. Ins. Co. v. Force*, 142 N. Y. 90, 100, 36 N. E. 874, 40 Am. St. Rep. 576.

<sup>81</sup> *Wayne County Sav. Bank v. Low*, 81 N. Y. 566, 37 Am. Rep. 533; *Jackson v. American Mortg. Co.*, 88 Ga. 756, 15 S. E. 812; *Mott v. Rowland*, 85 Mich. 561, 48 N. W. 638; *New England Mortg. Sec. Co. v. McLaughlin*, 87 Ga. 1, 13 S. E. 81; *Staples v. Nott*, 128 N. Y. 403, 28 N. E. 515, 26 Am. St. Rep. 480; *Andrews v. Pond*, 13 Pet. 65, 10 L. Ed. 61; *London Assurance Co. v. Companhia de Moagens Do Barreiro*, 167 U. S. 149, 161, 17 Sup. Ct. 785, 42 L. Ed. 113; *Nickels v. People's Building Loan & Saving Ass'n*, 93

Where a contract of loan is made between a citizen of Illinois and a corporation of Connecticut, and bonds are executed in Illinois, payable in a third state, and secured by mortgage upon real estate situated in Illinois, the defense of usury cannot be sustained upon the ground simply that the rate of interest exacted or reserved is in excess of that allowed by the state in which the bonds are made payable.<sup>82</sup>

## 16. LEX DOMICILII

### *Domicile Defined*

The domicile of a person is "the place or country which is considered by law to be his permanent home."<sup>83</sup> That place is properly the domicile of a person in which the habitation is fixed, without any present intention of removing therefrom.<sup>84</sup> As generally defined, a person's domicile is the place where he has his true, fixed, and permanent home, and principal establishment, and to which, if he is absent, he has the intention of returning. Beginning life as an infant, every person is at first necessarily dependent. When he becomes an independent person, he will find himself in possession of a domicile, which in most cases will be at the place of his birth, or "domicile of origin," as it is termed. By his own act and will, he can then acquire for himself a legal home or domicile different from that of origin, termed a "domicile of choice." This is acquired by actual residence, coupled with the intention to reside in a given place or country, and cannot be acquired in any other way. For that purpose, residence need not be of long duration.<sup>85</sup> If the intention of permanently residing in a particular place exists, a residence in pursuance of that intent, however short, will establish a domicile. The requisite animus is present intention of permanent or indefinite residence in a given place or country, or, negatively expressed, the absence of any present intention of not residing there permanently or indefinitely. Domicile of origin must be presumed to continue until another sole domicile has been acquired,

Va. 380, 25 S. E. 8. See *Glidden v. Chamberlin*, 167 Mass. 486, 46 N. E. 103, 57 Am. St. Rep. 479; *United States Savings & Loan Co. v. Scott*, 98 Ky. 695, 34 S. W. 235; *American Freehold Land & Mortgage Co. v. Jefferson*, 69 Miss. 770, 12 South. 464, 30 Am. St. Rep. 587; *Smith v. Dixon*, 150 App. Div. 571, 134 N. Y. Supp. 1097. See p. 425, ante.

<sup>82</sup> *Fowler v. Equitable Trust Co.*, 141 U. S. 384, 397, 12 Sup. Ct. 1, 35 L. Ed. 786.

<sup>83</sup> *Dacey, Dom.* p. 1.

<sup>84</sup> *In re Craignish*, [1892] 3 Ch. 180, 192; *Story, Conf. Laws*, § 430; *Hayes v. Hayes*, 74 Ill. 312, 314. See, also, *Foote, Int. Jur.* c. 2; *Westl. Priv. Int. Law*, c. 14; *U. S. Trust Co. v. Hart*, 150 App. Div. 413, 135 N. Y. Supp. 81, modified 208 N. Y. 617, 102 N. E. 1115.

<sup>85</sup> "A day or an hour will suffice." *Winans v. Winans*, 205 Mass. 388, 391, 91 N. E. 394, 28 L. R. A. (N. S.) 992.

by actual residence, coupled with the intention of abandoning the domicile of origin. This change must be *animo et facto*, and the burden of proof is on the party who asserts the change.<sup>86</sup>

Thus, if one is committed to a prison, he has a residence somewhere before going there, and before he can change that it would be requisite that he should go to the prison intending to make that his home and domicile, either permanently or for some unlimited time, and without any intention of returning or reverting to his former residence, and in fact intending thereby to change his former residence to the prison. But a prison is not a place of residence for a prisoner. It is not constructed or maintained for that purpose. It is a place of confinement for all except the warden and his family, and a person cannot, under guise of a commitment, or even without any commitment, go there as a prisoner, having a right to be there only as a prisoner, and thereby gain a residence there.<sup>87</sup>

### 17. RESIDENCE, INHABITANCY, AND DOMICILE COMPARED

Various statutes and rules of law employ, for the purposes of their varying provisions, the terms "residence," "inhabitancy," and "domicile," and to some extent the meaning to be attached to each of these terms varies according to the subject-matter or context or purpose of the statute or rule. Thus, it has been held that, within the meaning of statutes regulating attachments against the property of debtors, and arrest on civil process for debts, it was actual residence of the defendant, and not his domicile, that determined the rights of the parties;<sup>88</sup> and a similar construction has been given to the clause, sometimes found in statutes of limitations, providing that if, after the cause of action shall have accrued, the defendant shall "depart from, and reside out of, the state," the time of his absence shall not be included in the period of limitation.<sup>89</sup>

In general, inhabitancy and residence do not mean precisely the same thing as domicile, when the latter term is applied to succession

<sup>86</sup> *Price v. Price*, 156 Pa. 617, 27 Atl. 291; *Anderson v. Watt*, 138 U. S. 694, 706, 11 Sup. Ct. 449, 34 L. Ed. 1078; *Gilbert v. David*, 235 U. S. 561, 35 Sup. Ct. 164, 59 L. Ed. 360.

<sup>87</sup> *People v. Cady*, 143 N. Y. 100, 37 N. E. 673, 25 L. R. A. 399. As to domicile of origin and domicile of choice, see, also, *In re Craignish*, [1892] 3 Ch. 180; domicile of a lunatic, *Sharpe v. Crispin*, L. R. 1 Prob. & Div. 611, 618; *Urquhart v. Butterfield*, 37 Ch. Div. 357; *Mowry v. Latham*, 17 R. I. 480, 23 Atl. 13.

<sup>88</sup> *Penfield v. Chesapeake, O. & S. W. R. Co.*, 134 U. S. 351, 10 Sup. Ct. 566, 33 L. Ed. 940.

<sup>89</sup> *Barney v. Oelrichs*, 138 U. S. 529, 533, 11 Sup. Ct. 414, 34 L. Ed. 1037.

to personal estate, but they mean a fixed and permanent abode or dwelling place for the time being, as distinguished from a mere temporary locality of existence.<sup>90</sup> The word "inhabitaney" implies a more fixed and permanent abode than the word "residence," and frequently imports many privileges and duties which a mere resident cannot claim or be subject to, and the transient visit of a person for a time at a place does not make him a resident while there; something more is necessary to entitle him to that character. There must be a settled, fixed abode, and intention to remain permanently, at least for a time, for business or other purposes, to constitute a residence within the legal meaning of that term. It is a settled rule that a person may be a resident in one state and have his domicile in another.<sup>91</sup>

## 18. LEGAL EFFECTS OF DOMICILE

### (a) *As to Personal Capacity*

The question as to what law governs the validity of contracts, so far as concerns the personal capacity to contract, has received different answers, and in some particulars is involved in doubt. Thus Dicey<sup>92</sup> states it to be the general rule, subject to specified exceptions, that a person's capacity to enter into a contract is governed by the law of his domicile at the time of making the contract; while Gray, C. J., in *Milliken v. Pratt*,<sup>93</sup> treats the law of the place of contract as usually controlling, save in exceptional cases.<sup>94</sup> Thus, the capacity of an infant to contract is frequently held to be determined by the *lex loci contractus*.<sup>95</sup> In *Cooper v. Cooper*,<sup>96</sup> however, it is said that whether the capacity of a minor to bind himself by personal contract ought to be determined by the law of his domicile or by the *lex loci contractus* has been a fertile subject of controversy, but that perhaps, in England, the question is not finally settled, though the preponderance of

<sup>90</sup> *Wrigley's Case*, 4 Wend. (N. Y.) 602; *Id.*, 8 Wend. (N. Y.) 134.

<sup>91</sup> *Frost v. Brisbin*, 19 Wend. (N. Y.) 11, 32 Am. Dec. 423. See *Pells v. Snell*, 130 Ill. 379, 23 N. E. 117.

<sup>92</sup> *Conflict of Laws*, 543.

In the second edition, p. 534, it is admitted that the authority of the rule is shaken by dicta in *Ogden v. Ogden*, [1908] p. 46. At page 538 it is said that it may be that all contracts are not governed by the same rule, and that mercantile contracts may be subject to the law of the place of contract.

<sup>93</sup> 125 Mass. 374, 28 Am. Rep. 241.

<sup>94</sup> Also *Taylor v. Sharp*, 108 N. C. 377, 381, 13 S. E. 138.

<sup>95</sup> *Male v. Roberts*, 3 Esp. 163; *Thompson v. Ketchum*, 8 Johns. (N. Y.) 189, 5 Am. Dec. 332; *Baldwin v. Gray*, 4 Mart. N. S. (La.) 192, 193, 16 Am. Dec. 169; *Saul v. His Creditors*, 5 Mart. N. S. (La.) 569, 597, 16 Am. Dec. 212.

<sup>96</sup> 13 App. Cas. 88, 108.

opinion there, as well as in America, seems to be in favor of the law of the domicile.<sup>97</sup>

So, according to most authorities, the capacity of a married woman to contract is determined by the law, not of the domicile, but of the contract.<sup>98</sup> Thus, if a married woman domiciled in Massachusetts signs a note there, written and dated at a place in Maine, as surety for her husband (which by the laws of her domicile she cannot do), and mails it to the payee in Maine, where it is accepted and acted on, its validity and binding effect upon her is to be determined by the law of Maine.<sup>99</sup>

Where a married woman, a resident of one state, enters into a contract in another state, to take effect in that state, which, though valid there, is invalid in her own state, and the latter state afterwards empowers her to make such a contract, the contract may be there used upon.<sup>1</sup>

Where one domiciled in one state subscribes for stock of a national bank of another state, and then transfers it to his wife, so that, by the law of the state of their domicile, she becomes owner thereof, she is subject to a stockholder's liability, under Rev. St. U. S. § 5152 (U. S. Comp. St. 1916, § 9690), without regard to the laws of the state where the bank is relative to contracts by married women.<sup>2</sup> The capacity of a husband to contract with his wife, and her competency to receive his covenant, are determined by the law of their domicile, even in respect to a contract by him to surrender his rights in lands owned in another state, and the contract will be there recognized and enforced.<sup>3</sup>

<sup>97</sup> *Cooper v. Cooper*, 13 App. Cas. 88, 108.

<sup>98</sup> *Pearl v. Hansborough*, 9 Humph. (Tenn.) 426; *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241. Contra: *Armstrong v. Best*, 112 N. C. 59, 17 S. E. 14, 25 L. R. A. 188, 34 Am. St. Rep. 473; *Freeman's Appeal*, 68 Conn. 533, 37 Atl. 420, 37 L. R. A. 452, 57 Am. St. Rep. 112.

<sup>99</sup> *Bell v. Packard*, 69 Me. 105, 31 Am. Rep. 251; *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241; *Bowles v. Field* (C. C.) 78 Fed. 742; *Evans v. Beaver*, 50 Ohio St. 190, 33 N. E. 643, 40 Am. St. Rep. 666. See, also, *Baum v. Birchall*, 150 Pa. 164, 24 Atl. 620, 30 Am. St. Rep. 797; *Robinson v. Queen*, 87 Tenn. 445, 11 S. W. 38, 3 L. R. A. 214, 10 Am. St. Rep. 690. Contra: *Freeman's Appeal*, 68 Conn. 533, 37 Atl. 420, 37 L. R. A. 452, 57 Am. St. Rep. 112; *Chemical Nat. Bank of New York v. Kellogg*, 183 N. Y. 92, 75 N. E. 1103, 2 L. R. A. (N. S.) 299, 111 Am. St. Rep. 717, 5 Ann. Cas. 158.

<sup>1</sup> *Case v. Dodge*, 18 R. I. 661, 29 Atl. 785; *Milliken v. Pratt*, 125 Mass. 374, 376, 28 Am. Rep. 241.

<sup>2</sup> *Kerr v. Urie*, 86 Md. 72, 37 Atl. 789, 38 L. R. A. 119, 63 Am. St. Rep. 493.

<sup>3</sup> *Polson v. Stewart*, 167 Mass. 211, 45 N. E. 737, 36 L. R. A. 771, 57 Am. St. Rep. 452. But the rule is otherwise as to a conveyance of land. *Ross v. Ross*, 129 Mass. 243, 246, 37 Am. Rep. 321. And even as to contracts to convey. See *Cochran v. Benton*, 126 Ind. 58, 25 N. E. 870; *Doyle v. McGuire*, 38 Iowa, 410; *Sell v. Miller*, 11 Ohio St. 331.



(b) *Domicile of Student*

The question of the bearing of a residence acquired by a student, in connection with the pursuit of his studies at an institution of learning, upon his domicile, is sometimes regulated by statute. It may sometimes happen, when a student leaves his previous place of abode, in order to pursue studies at such an institution, he does, in fact, take up a permanent residence at the place where the institution is located, with the intention of abandoning his previous domicile and establishing a new one. On the other hand, it may be that the change is one of residence merely, and not of domicile. This distinction is recognized by the New York constitution,<sup>4</sup> to the effect that, for the purpose of voting, a residence cannot be gained or lost by reason of presence or absence while a student of any seminary of learning. Under that provision a student who has previously been domiciled elsewhere does not acquire a new residence at the place where he goes to study, unless his intent to change his domicile is manifested by acts other than his mere presence as a student in his new place of residence.<sup>5</sup>

(c) *Domicile of Corporation*

A corporation always has a domicile in the state or country in which it is incorporated.<sup>6</sup>

(d) *Domicile of Infant*

An infant has, during his minority, the same domicile as his father.<sup>7</sup> An illegitimate child has the domicile of his mother;<sup>8</sup> but if an illegitimate child is afterwards legitimated, according to the law of the parents' domicile, by their subsequent marriage, while he cannot in consequence inherit land, by intestacy, in a country where such an effect is not given to a subsequent marriage, he may nevertheless be entitled to take it as a "child" of the parent, under a devise to his "children."<sup>9</sup> But in New York the subsequent remarriage of the parents, which according to the law of their domicile would legitimate the child, renders him legitimate in New York for all purposes, including the right to inherit.<sup>10</sup>

<sup>4</sup> Article 2, § 3.

<sup>5</sup> *In re Garvey*, 147 N. Y. 117, 41 N. E. 439.

<sup>6</sup> *Clark, Corporations* (3d Ed.) p. 83; *Germanic Fire Ins. Co. v. Francis*, 11 Wall. 210, 20 L. Ed. 77; *Dicey, Conf. of L.* (2d Ed.) p. 163.

<sup>7</sup> *In re Macreight*, 30 Ch. Div. 165.

<sup>8</sup> *In re Beaumont*, [1893] 3 Ch. 490; *Ryall v. Kennedy*, 40 N. Y. Super. Ct. 347, 361.

<sup>9</sup> *Birtwhistle v. Vardill*, 2 Clark & F. 571, 7 Clark & F. 895; *In re Grey's Trusts*, [1892] 3 Ch. 88.

<sup>10</sup> *Miller v. Miller*, 91 N. Y. 315, 43 Am. Rep. 669. See *Laws N. Y.* 1896, c. 272, § 18.

(e) *Domicile of a Married Woman*

A married woman is domiciled where the husband has his domicile, even though she may be in fact residing in another place, and even though she is living apart from her husband, if without sufficient cause.<sup>11</sup> This rule is founded upon the theoretical identity of person and of interest between husband and wife, as established by law, and the presumption that, from the nature of that relation the home of the one is that of the other; and is intended to promote, strengthen, and secure their interests in this relation, as it ordinarily exists, where unity and harmony prevail. But the law will recognize a wife as having a separate existence, and separate interests and separate rights, in those cases where the express object of legal proceedings is to show that the relation itself ought to be dissolved for the husband's fault, or so modified as to establish separate interests.<sup>12</sup>

Upon the insanity of a husband and his confinement in an asylum, the wife, having the burden of her own support, may acquire a separate domicile.<sup>13</sup>

(f) *Change of Domicile*

The act which, if coupled with a due intent, may suffice to constitute a change of domicile, may be any act whatever which in its nature may, in a given case, bear out the claim of a change; but it must, in effect, be an actual change of residence.<sup>14</sup>

(g) *Situs of a Debt*

The general rule is settled that the situs of debts and obligations is at the domicile of the creditor. But the attachment laws of New York and of other states recognize the right of a creditor of a non-resident to attach the debt or credit, owing or due to him, from a person within the jurisdiction where the attachment issues, and to this extent the principle has been sanctioned that the laws of the state, for the purposes of attachment proceedings, may fix the situs of a debt at the domicile of the debtor.<sup>15</sup>

<sup>11</sup> Cheely v. Clayton, 110 U. S. 701, 705, 4 Sup. Ct. 328, 28 L. Ed. 298; Anderson v. Watt, 138 U. S. 694, 706, 11 Sup. Ct. 449, 34 L. Ed. 1078.

<sup>12</sup> Harteau v. Harteau, 14 Pick. (Mass.) 181, 185, 25 Am. Dec. 372; Burtis v. Burtis, 161 Mass. 508, 37 N. E. 740; Anderson v. Watt, 138 U. S. 694, 706, 11 Sup. Ct. 449, 34 L. Ed. 1078; In re Mackenzie, [1911] 1 Ch. 578.

<sup>13</sup> McKnight v. Dudley, 148 Fed. 204, 78 C. C. A. 162.

<sup>14</sup> Mitchell v. U. S., 21 Wall. 350, 22 L. Ed. 584; Brown v. Butler, 87 Va. 621, 13 S. E. 71; Dicey, Conf. Laws, 105-119; Chambers v. Prince (C. C.) 75 Fed. 176; McMullen v. Wadsworth, 14 App. Cas. 631, 636; Wilberding v. Miller, 88 Ohio St. 609, 106 N. E. 665, L. R. A. 1916A, 718; Duke v. Duke, 70 N. J. Eq. 135, 62 Atl. 466, affirmed 72 N. J. Eq. 434, 65 Atl. 1117; In the Matter of Goodman, 146 N. Y. 284, 40 N. E. 769.

<sup>15</sup> Douglass v. Phenix Ins. Co., 138 N. Y. 209, 219, 33 N. E. 938, 20 L. R. A.

Indeed, it appears to be sufficient for the purpose of attachment that any circumstance exists which affords colorable ground for giving the debt a location within the jurisdiction of the attaching court.<sup>16</sup>

In some states all that is necessary is that the debtor be liable to suit upon the debt in the jurisdiction where the attachment issues, for in strictness a debt has no location.<sup>17</sup> But, if the debt is not there enforceable by the creditor against the debtor, it is universally held that it cannot be attached.<sup>18</sup>

(h) *As to Marriage*

The domicile of parties to a marriage contract, entered into in another jurisdiction, does not control its validity, which depends in general on the law of the place where it was contracted.<sup>19</sup>

(i) *As to Divorce*

The bearing of the question of domicile upon the validity of a divorce has been elsewhere discussed. But a general discussion of the subject may be found also in *Thompson v. Waters*,<sup>20</sup> *Knowlton v. Knowlton*,<sup>21</sup> *Flower v. Flower*,<sup>22</sup> and *Anthony v. Rice*,<sup>23</sup> which should be read in connection with those cited under "Foreign Divorce."<sup>24</sup>

(j) *As to Wills*

The law of a testator's domicile controls as to the formal requisites of the validity of a will of personal property, the capacity of the testator, and the construction of the instrument. But a will of real property must be executed in compliance with the law of the place

118, 34 Am. St. Rep. 448. See *National Fire Ins. Co. of Hartford v. Chambers*, 53 N. J. Eq. 468, 32 Atl. 663.

<sup>16</sup> As that the debt arose out of business transacted in the state by the debtor, *India Rubber Co. v. Katz*, 65 App. Div. 349, 72 N. Y. Supp. 658; or by the creditor, *Flynn v. White*, 122 App. Div. 780, 107 N. Y. Supp. 860; or where the certificates representing the debt are deposited in the state for sale, *People ex rel. Wynn v. Grifenhagen*, 167 App. Div. 572, 152 N. Y. Supp. 679; or for pledge, *Simpson v. Jersey City Contracting Co.*, 165 N. Y. 193, 58 N. E. 896, 55 L. R. A. 796.

<sup>17</sup> See *Nat. Fire Ins. Co. v. Chambers*, *supra*; and *contra*, *Douglass v. Phoenix Ins. Co.*, *supra*.

The doctrine of the first case above is now distinctly recognized by the United States Supreme Court, and the validity of such an attachment must be recognized in other states. *Harris v. Balk*, 198 U. S. 215, 25 Sup. Ct. 625, 49 L. Ed. 1023, 3 Ann. Cas. 1084; *Louisville & N. R. Co. v. Deer*, 200 U. S. 176, 26 Sup. Ct. 207, 50 L. Ed. 426.

<sup>18</sup> *Bridges v. Wade*, 113 App. Div. 350, 99 N. Y. Supp. 126.

<sup>19</sup> *Milliken v. Pratt*, 125 Mass. 374, 380, 28 Am. Rep. 241. See *post*, p. 450, "Foreign Marriages." But see, *contra*, *Cunningham v. Cunningham*, 206 N. Y. 341, 99 N. E. 845, 43 L. R. A. (N. S.) 355.

<sup>20</sup> 25 Mich. 247, 12 Am. Rep. 243.

<sup>21</sup> 155 Ill. 158, 39 N. E. 595.

<sup>22</sup> 42 N. J. Eq. 152, 7 Atl. 669.

<sup>23</sup> 110 Mo. 223, 19 S. W. 423.

<sup>24</sup> *Post*, p. 451.

where the land lies. And if a will contains a particular bequest of funds, to be transmitted to and administered for particular purposes in another state, the validity of the bequest may depend upon the law of the latter state.<sup>25</sup>

The validity of the execution of a testamentary power of disposition of personal property depends on the law of the domicile, not of the donee, but of the testator—the donor of the power.<sup>26</sup> The distribution of a decedent's personal estate is governed by the law of the testator's domicile.<sup>27</sup>

(k) *As to General Assignments for Creditors*

The general rule that the validity of a transfer of personal property is governed by the law of the domicile of the owner is in most jurisdictions held to apply to a transfer by voluntary assignment by a debtor of all his property for the benefit of his creditors, as well as to a specific transfer by way of ordinary sale or contract, and the title of such assignee, valid by the law of the domicile, will prevail against the lien of an attachment issued and levied in another state or country subsequent to the assignment, in favor of a creditor there, whether a citizen or a nonresident, upon a debt or chattel belonging to the assignor, embraced in the assignment, provided the recognition of the title under the assignment would not contravene the statutory law of the state or be repugnant to its public policy. This is the general, though not the universal, rule, supported by the preponderating weight of authority, and is the settled law of New York.<sup>28</sup>

But this general rule is subject to a qualification, established in the jurisprudence of the American states, that a title to personal property

<sup>25</sup> *Sickles v. City of New Orleans*, 26 C. C. A. 204, 80 Fed. 868; *Chamberlain v. Chamberlain*, 43 N. Y. 431; *Jones v. Habersham*, 107 U. S. 179, 2 Sup. Ct. 336, 27 L. Ed. 401; *Dammert v. Osborn*, 140 N. Y. 30, 35 N. E. 407; *Id.*, 141 N. Y. 565, 35 N. E. 1088. See *Schouler, Wills* (5th Ed.) § 491.

<sup>26</sup> *Cotting v. De Sartiges*, 17 R. I. 668, 24 Atl. 530, 16 L. R. A. 367.

<sup>27</sup> *Jenkins v. Guarantee Trust & Safe-Deposit Co.*, 53 N. J. Eq. 194, 32 Atl. 208; *Bruce v. Bruce*, 6 Brown, Parl. Cas. 566; *Doglioni v. Crispin*, L. R. 1 H. L. 301. As to the rule in testamentary provisions creating perpetuities, or effecting a suspension of the power of alienation, see *Whitney v. Dodge*, 105 Cal. 192, 38 Pac. 636; *Cross v. United States Trust Co. of New York*, 131 N. Y. 330, 30 N. E. 125, 15 L. R. A. 606, 27 Am. St. Rep. 597; *In the Matter of Hartman*, 70 N. J. Eq. 664, 62 Atl. 560.

<sup>28</sup> *Barth v. Backus*, 140 N. Y. 230, 234, 35 N. E. 425, 23 L. R. A. 47, 37 Am. St. Rep. 545; *Ockerman v. Cross*, 54 N. Y. 29; *Speed v. May*, 17 Pa. 91, 55 Am. Dec. 540; *Forbes v. Scannell*, 13 Cal. 242. See *Train v. Kendall*, 137 Mass. 366; *Pierce v. O'Brien*, 129 Mass. 314, 37 Am. Rep. 360; *Van Winkle v. Armstrong*, 41 N. J. Eq. 402, 5 Atl. 449; *Bentley v. Whittemore*, 19 N. J. Eq. 462, 97 Am. Dec. 671; *Consolidated Tank-Line Co. v. Collier*, 148 Ill. 259, 35 N. E. 756, 39 Am. St. Rep. 181. See *Dearing v. McKinnon Dash & Hardware Co.*, 33 App. Div. 31, 53 N. Y. Supp. 513.

acquired in invitum under foreign insolvent or bankrupt laws, though good according to the law of the state where the proceedings were taken, will not be recognized in another state, where it comes in conflict with the rights of creditors pursuing their remedy there against the property of the debtor.<sup>29</sup> And some states refuse to recognize the validity of the title of a foreign assignee, even in case of voluntary assignments, where it comes in conflict with the claims of domestic creditors.<sup>30</sup> But New York, recognizing the full validity of such assignments, makes no such distinction between foreign and domestic creditors, in case of an involuntary transfer.<sup>31</sup> And the same rule applies in some other states.<sup>32</sup>

## 19. LEX FORI

Whatever relates merely to the remedy, and constitutes part of the procedure, is determined by the law of the forum, for matters of process must be uniform in the courts of the same country; but whatever goes to the substance of the obligation, and affects the rights of the parties, as growing out of the contract itself, and inhering in, or attaching to it, is governed by the law of the contract. And, still further, wherever any matter is not, according to settled principles, to be decided in accordance with the law of any other place, it must be settled by the law of the forum.<sup>33</sup>

Thus, whether an assignee of a chose in action shall sue in his own name, or that of his assignor, is a technical question of mere process, and determinable by the law of the forum;<sup>34</sup> but whether the foreign assignment on which the plaintiff claims is valid at all, or whether valid against the defendant, goes to the merits, and must be decided by the law of the place in which the case has its legal seat. And the same claim may sometimes be a mere matter of process, and so determinable by the law of the forum, and sometimes a matter of sub-

<sup>29</sup> *Holmes v. Remsen*, 20 Johns. (N. Y.) 229, 11 Am. Dec. 269; *Barth v. Backus*, 140 N. Y. 230, 235, 35 N. E. 425, 23 L. R. A. 47, 37 Am. St. Rep. 545.

<sup>30</sup> *May v. Wannemacher*, 111 Mass. 202; *Moore v. Bonnell*, 31 N. J. Law, 90.

<sup>31</sup> *Barth v. Backus*, 140 N. Y. 230, 239, 35 N. E. 425, 23 L. R. A. 47, 37 Am. St. Rep. 545; *Martyne v. American Union Fire Ins. Co. of Philadelphia*, 216 N. Y. 183, 110 N. E. 502.

<sup>32</sup> *McClure v. Campbell*, 71 Wis. 350, 37 N. W. 343, 5 Am. St. Rep. 220; *South Boston Iron Co. v. Boston Locomotive Works*, 51 Me. 585.

<sup>33</sup> *Pritchard v. Norton*, 106 U. S. 124, 129, 1 Sup. Ct. 102, 27 L. Ed. 104; *Sinnott v. Hanan*, 214 N. Y. 454, 108 N. E. 858; *International Text-Book Co. v. Connelly*, 206 N. Y. 188, 99 N. E. 722, 42 L. R. A. (N. S.) 1115.

<sup>34</sup> *Id.* But see *Lower v. Segal*, 59 N. J. Law, 66, 34 Atl. 945. See *Gleason v. Northwestern Mut. Life Ins. Co.*, 203 N. Y. 507, 97 N. E. 35.

stance, going to the merits, and therefore determinable by the law of the contract. Thus, in the courts of America, the defense of the statute of limitations is governed by the law of the forum, as being a matter of mere procedure, while in continental Europe the defense of prescription is regarded as going to the substance of the contract, and therefore is governed by the law of the seat of the obligation; and it has been held that, when such a case arises in an American court, in reference to a claim thus absolutely extinguished and nullified by the foreign law, the same result, in the absence of any special considerations depending on absence from the state, etc., will follow here, and the claim will be regarded as not only barred, but as void.<sup>35</sup>

The principle that what is apparently a mere matter of remedy in some circumstances becomes in others, where it attaches to the substance of the controversy, a matter of right, is familiar in the application of the constitutional provision prohibiting the passing by a state of any law impairing the obligation of contracts; for any law which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the constitution.<sup>36</sup>

The law of the forum determines the form of the action, as, whether it shall be assumpsit, covenant, or debt.<sup>37</sup> It regulates all process, both mesne and final.<sup>38</sup> It may also admit, as a part of its domestic procedure, a set-off or counterclaim of distinct causes of action, between parties to the suit, though not admissible by the law of the place of the contract.<sup>39</sup> The rules of evidence are also applied by the law of the forum.<sup>40</sup> Thus, a contract, valid by the law of the place

<sup>35</sup> *Pritchard v. Norton*, 106 U. S. 124, 131, 1 Sup. Ct. 102, 27 L. Ed. 104; *New York & Cuba Mail S. S. Co. v. Maldonado & Co.*, 225 Fed. 353, 140 C. C. A. 377; *Peterson v. Thompson*, 78 Or. 158, 151 Pac. 721; *Johnson v. Phoenix Bridge Co.*, 197 N. Y. 316, 90 N. E. 953. But see *Sharrow v. Inland Lines*, 214 N. Y. 101, 108 N. E. 217, L. R. A. 1915E, 1192, Ann. Cas. 1916D, 1236.

<sup>36</sup> *McCracken v. Hayward*, 2 How. 608, 612, 11 L. Ed. 397.

So under federal Employers' Liability Act the rule as to burden of proof as to contributory negligence is matter of substance. *Central Vt. Ry. Co. v. White*, 238 U. S. 507, 35 Sup. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B, 252.

<sup>37</sup> *Warren v. Lynch*, 5 Johns. (N. Y.) 239; *Adam v. Kerr*, 1 Bos. & P. 360; *Ferguson v. Central R. Co. of N. J.*, 71 N. J. Law, 647, 60 Atl. 382, affirmed 74 N. J. Law, 691, 67 Atl. 602; *Seely v. Manhattan Life Ins. Co.*, 72 N. H. 49, 55 Atl. 425.

<sup>38</sup> *Ogden v. Saunders*, 12 Wheat. 213, 6 L. Ed. 606.

<sup>39</sup> *Gibbs v. Howard*, 2 N. H. 296; *Ruggles v. Keeler*, 3 Johns. (N. Y.) 263, 3 Am. Dec. 482.

<sup>40</sup> *Wilcox v. Hunt*, 13 Pet. 378, 10 L. Ed. 209; *Bain v. Railroad Co.*, 3 H. L. Cas. 1; *Hoadley v. Northern Transportation Co.*, 115 Mass. 304, 15 Am. Rep. 106; (proof of protest) *Corbin v. Planters' Nat. Bank*, 87 Va. 661, 13 S. E. 98, 24 Am. St. Rep. 673; *Perry v. Rubber Tire Wheel Co. (C. C.)*

where it was made, although not in writing, will not be enforced in the courts of a country where the statute of frauds prevails, unless it is put in writing.<sup>41</sup>

Where the law of the forum and that of the place of the execution of the contract coincide, it will be enforced, although required to be in writing by the law of the place of performance, as was the case of *Scudder v. Union Nat. Bank*,<sup>42</sup> because the form of the contract is regulated by the law of the place of its celebration, and the evidence of it by that of the forum.

But the question of consideration, whether arising upon the admissibility of evidence or presented as a point in pleading, is not one of procedure and remedy. It goes to the substance of the right itself, and applies to the constitution of the contract.<sup>43</sup> Where a mortgagee has acquired, by the law of the state where the mortgaged land is situated, a right to enforce, against a grantee of the mortgagor, his agreement to assume and pay the mortgage debt, yet the form of his remedy, whether it must be in covenant or in assumpsit, at law or in equity, is governed by the law of the place where the action is brought.<sup>44</sup>

The statutes of another state have of course no extraterritorial force, but rights acquired under them will always in comity be enforced, if not against the public policy of the laws of the state where the action is brought. In such cases the law of the place where the right was acquired or the liability was incurred will govern as to the right of action, while all that pertains merely to the remedy will be controlled by the law of the state where the action is brought. And the principle is the same whether the right of action be *ex contractu* or *ex delicto*. Thus, in an action to recover damages for death caused by the defendant's negligence, where the death occurred in Montana and the action was brought in Minnesota, it appeared that, when the death occurred the limit of recovery under the laws of Minnesota was \$5,000, but at the time of the trial of the case the limit had been increased to \$10,000, while, under the laws of Montana, the recovery was limited to such an amount as the jury might think proper under all the circumstances. There was a verdict for \$10,000.

138 Fed. 836; *Atwood v. Walker*, 179 Mass. 514, 61 N. E. 58; *Meyer v. Supreme Lodge, K. of P.*, 178 N. Y. 63, 70 N. E. 111, 64 L. R. A. 839, affirmed 198 U. S. 508, 25 Sup. Ct. 754, 49 L. Ed. 1146.

<sup>41</sup> *Leroux v. Brown*, 12 C. B. 801.

<sup>42</sup> 91 U. S. 406, 23 L. Ed. 245.

<sup>43</sup> *Pritchard v. Norton*, 106 U. S. 124, 135, 1 Sup. Ct. 102, 27 L. Ed. 104.

<sup>44</sup> *Willard v. Wood*, 135 U. S. 309, 10 Sup. Ct. 831, 34 L. Ed. 210.

It was held that the right to recovery, and the limit of recovery, were governed by the *lex loci*, and not by the *lex fori*.<sup>45</sup>

It is a principle of universal application, recognized in all civilized states, that the statutes of one state have, *ex proprio vigore*, no force or effect in another. The enforcement of such a law depends on the express or tacit consent of the latter state by virtue of the adoption of the doctrine of comity—a doctrine which has many limitations and qualifications.<sup>46</sup>

It is a well-settled rule, founded on reason and authority, that the *lex fori* furnishes in all cases, *prima facie*, the rule of decision, and if either party wishes the benefit of a different rule or law—as, for instance, the *lex domicilii*, *lex loci contractus*, or *lex loci rei sitæ*—he must aver and prove it. The courts of a country are presumed to be acquainted only with their own laws; those of other countries are to be averred and proved like other facts of which courts do not take notice.<sup>47</sup>

It is equally well settled that the several states of the Union are to be considered in this respect as foreign to each other, and that the courts of one state are not presumed to know, and therefore not bound to take judicial notice of, the laws of another state.<sup>48</sup>

The courts of the United States take notice, without proof, of the laws of each of the United States, when exercising an original jurisdiction. When the federal supreme court exercises an appellate jurisdiction from a lower court of the United States, it takes judicial notice of the laws of every state of the Union, because those laws are known to the court below as laws needing no averment or proof; but on a writ of error to the highest court of a state, while the law of that state, being known to its courts as law, is of course within the judicial notice of the supreme court at the hearing on error, yet, as in the state court the laws of another state are but facts requiring to be proved in order to be considered, the supreme court does not take judicial notice of them, unless made part of the record sent up, unless by the local law of a state its highest court does take judicial notice of the laws of other states.<sup>49</sup>

<sup>45</sup> *Northern Pac. R. Co. v. Babcock*, 154 U. S. 190, 14 Sup. Ct. 978, 38 L. Ed. 958. Compare *Wooden v. Western N. Y. & P. R. Co.* 126 N. Y. 10, 16, 17, 26 N. E. 1050, 13 L. R. A. 458, 22 Am. St. Rep. 803; *Dennick v. Central R. Co. of New Jersey*, 103 U. S. 11, 26 L. Ed. 439; *Howey v. New England Nav. Co.*, 83 Conn. 278, 76 Atl. 469.

<sup>46</sup> *Marshall v. Sherman*, 148 N. Y. 9, 25, 42 N. E. 419, 34 L. R. A. 757, 51 Am. St. Rep. 654.

<sup>47</sup> *Monroe v. Douglass*, 5 N. Y. 452; *Latham v. De Loisselle*, 3 App. Div. 525, 38 N. Y. Supp. 270; *Davison v. Gibson*, 5 C. C. A. 543, 56 Fed. 443.

<sup>48</sup> *Hanley v. Donoghue*, 116 U. S. 1, 4, 6 Sup. Ct. 242, 29 L. Ed. 535.

<sup>49</sup> *Hanley v. Donoghue*, 116 U. S. 1, 6, 6 Sup. Ct. 242, 29 L. Ed. 535.



The principle that, in the absence of proof of different laws existing in the place where a contract was made, or where transactions involved occurred, the court in which an action is pending will proceed according to its own laws, applies, not to its statute laws, but to the common law;<sup>50</sup> for it presumes, in the absence of proof, that the common law prevails in other states settled by English colonists, and if the party wishes to prove the contrary, or to rest his rights upon some statute of another state, he must produce proof in support of his position.<sup>51</sup> But this principle does not apply, for example, to Russia, or the Indian Territory, or the Creek Nation.<sup>52</sup> In such cases, in the absence of proof of the foreign law, the law of the forum prevails.<sup>53</sup>

### *Statute of Limitations*

The limitation of actions is governed by the *lex fori*, and is controlled by the Legislatures of the several states in which the action is brought, as construed by the highest court of that state, even though the judicial construction differs from that prevailing in other jurisdictions,<sup>54</sup> subject to the qualification that the state in question cannot by its statute make any discrimination against the citizens, the contracts, or the judgments of other states, or against any right asserted under the Constitution or laws of the United States.<sup>55</sup>

## 20. LEX LOCI ACTUS

"Another law often invoked is the *lex loci actus*—that of the place where the instrument was executed or where judicial proceedings have been had."<sup>56</sup> The *lex loci actus* governs the forms of instruments, and the validity of foreign judicial proceedings.<sup>57</sup>

<sup>50</sup> *Kelley v. Kelley*, 161 Mass. 111, 36 N. E. 837, 25 L. R. A. 806, 42 Am. St. Rep. 389; *Waln v. Waln*, 53 N. J. Law, 429, 22 Atl. 203.

<sup>51</sup> *Wooden v. Western N. Y. & P. R. Co.*, 126 N. Y. 10, 26 N. E. 1050; *Chase v. Alliance Ins. Co.*, 9 Allen (91 Mass.) 311; *National Bank of Michigan v. Green*, 33 Iowa, 140; *Mohr v. Miesen*, 47 Minn. 228, 49 N. W. 862; *Hasbrouck v. New York Cent. & H. R. R. Co.*, 202 N. Y. 363, 95 N. E. 808, 35 L. R. A. (N. S.) 537, Ann. Cas. 1912D, 1150.

<sup>52</sup> *Davison v. Gibson*, 5 C. C. A. 543, 56 Fed. 443.

<sup>53</sup> *Davison v. Gibson*, *supra*. See *Parrott v. Mexican Cent. Ry. Co.*, 207 Mass. 184, 93 N. E. 590, 34 L. R. A. (N. S.) 261.

<sup>54</sup> *Great Western Tel. Co. v. Purdy*, 162 U. S. 329, 339, 16 Sup. Ct. 810, 40 L. Ed. 986; *Munos v. Southern Pac. Co.*, 2 C. C. A. 163, 51 Fed. 188; *Hixon v. Rodbourn*, 67 App. Div. 424, 73 N. Y. Supp. 779; *Jaqui v. Benjamin*, 80 N. J. Law, 10, 77 Atl. 468.

<sup>55</sup> *Christmas v. Russell*, 5 Wall. 290, 18 L. Ed. 475.

<sup>56</sup> *Westl. Priv. Int. Law*, p. 6.

"The law of the place where a legal transaction takes place." *Dicey, Conf. of L.* (2d Ed.) p. 78, note 1.

<sup>57</sup> *Id.* p. 9.

## 21. ACTIONS ON JUDGMENTS

Where a judgment is procured by one litigant against another, it is, of course, enforceable as such, by process, only within the nation or state in which it was rendered. If, for example, a judgment is rendered in New Jersey, execution cannot be levied under it in Pennsylvania; if it is rendered in the federal Circuit Court for the Southern district of New York, execution cannot be levied in the federal district of Rhode Island; if it is rendered in England, execution cannot be levied in the United States. In any case in which it is desired to reach property situated in a jurisdiction other than that in which the judgment is rendered, and subject it to satisfaction of the judgment, it is necessary, in order to utilize the judgment, to bring a new action upon it in the latter jurisdiction. Sometimes, also, a party seeks to utilize the judgment of another jurisdiction, not as the basis of a new action, but by way of defense, or as evidence in an action. As the principles in accordance with which the permissibility of such use of a foreign judgment are determined differ in some respects, according as the two different jurisdictions involved are, on the one hand, nations, or a nation and a state of the Union, or are, on the other hand, both states of the Union, these two situations will be considered separately. In both cases, the judgment, of whatever nature, in order to be entitled to any effect, must have been rendered by a court having jurisdiction of the cause, and upon regular proceedings and due notice.<sup>58</sup>

### (1) *As Between Nations, or a Nation and a State*

(a) A judgment in rem, adjudicating the title to a ship or other movable property within the custody of the court, is treated as valid everywhere. The most common illustrations of this are decrees of courts of admiralty and prize, which proceed upon principles of international law; but the same rule applies to judgments in rem under municipal law.<sup>59</sup>

(b) So, also, where the matter in controversy is land or other immovable property, a judgment pronounced in the *forum rei sitæ* is held to be of universal obligation, as to all matters of right and title which it professes to decide in relation thereto, and is absolutely conclusive.<sup>60</sup>

<sup>58</sup> *Hilton v. Guyot*, 159 U. S. 113, 166, 16 Sup. Ct. 139, 40 L. Ed. 95.

<sup>59</sup> *Hilton v. Guyot*, 159 U. S. 113, 167, 16 Sup. Ct. 139, 40 L. Ed. 95; *Williams v. Armroyd*, 7 Cranch, 423, 432, 3 L. Ed. 392; *Croudson v. Leonard*, 4 Cranch, 434, 2 L. Ed. 670; *Hudson v. Guestier*, 4 Cranch, 293, 2 L. Ed. 625; *Scott v. McNeal*, 154 U. S. 34, 46, 14 Sup. Ct. 1108, 38 L. Ed. 896; *Castrique v. Imrie*, L. R. 4 H. L. 414; *Ludlow v. Dale*, 1 Johns. Cas. (N. Y.) 16.

<sup>60</sup> *Monroe v. Douglas*, 4 Sandf. Ch. (N. Y.) 126, 179.

(c) A judgment affecting the status of persons, such as a decree confirming or dissolving a marriage, is recognized as valid in every country, unless contrary to the policy of its own laws.<sup>61</sup>

(d) Other judgments, not strictly in rem, under which a person has been compelled to pay money, are so far conclusive that the justice of the payment cannot be impeached in another country, so as to compel him to pay it again. For instance, a judgment in foreign attachment is conclusive, as between the parties, of the right to the property or money attached; and if, on the dissolution of a partnership, one partner promises to indemnify the other against the debts of the partnership, a judgment for such a debt, under which the latter has been compelled to pay it, is conclusive evidence of the debt, in a suit by him to recover the amount upon the promise of indemnity.<sup>62</sup> Other foreign judgments which have been held conclusive of the matter adjudged were judgments discharging obligations contracted in the foreign country, between citizens or residents thereof.<sup>63</sup>

(e) The extraterritorial effect of judgments in personam, at law or in equity, may differ, according to the parties to the cause. A judgment of that kind, between two citizens or residents of the country, and therefore subject to the jurisdiction in which it was rendered, may be held conclusive as between them everywhere. So, if a foreigner invokes the jurisdiction by bringing an action against a citizen, both may be held bound by a judgment in favor of either. And if a citizen sues a foreigner, and judgment is rendered in favor of the latter, both may be held equally bound.<sup>64</sup>

The effect to which a judgment, purely executory, rendered in favor of a citizen or resident of the country, in a suit there brought by him against a foreigner, may be entitled, in an action thereon against the latter in his own country, presents a more difficult question, upon which there has been some diversity of opinion.<sup>65</sup> The cases last cited es-

<sup>61</sup> *Hilton v. Guyot*, 159 U. S. 113, 167, 16 Sup. Ct. 139, 40 L. Ed. 95; *Cottingham's Case*, 2 Swanst. 326; *Roach v. Garvan*, 1 Ves. Sr. 157; *Harvey v. Farnie*, 8 App. Cas. 43; *Cheely v. Clayton*, 110 U. S. 701, 4 Sup. Ct. 328, 28 L. Ed. 298.

<sup>62</sup> *Hilton v. Guyot*, 159 U. S. 113, 168, 16 Sup. Ct. 139, 40 L. Ed. 95; *Gold v. Canham*, 2 Swanst. 325, note, 1 Cas. Ch. 311; *Tarleton v. Tarleton*, 4 Maule & S. 20; *Konitzky v. Meyer*, 49 N. Y. 571.

<sup>63</sup> *Hilton v. Guyot*, 159 U. S. 113, 168, 16 Sup. Ct. 139, 40 L. Ed. 95; *May v. Breed*, 7 Cush. (Mass.) 15, 54 Am. Dec. 700; *Burroughs v. Jamineau*, Mos. 1, 2 Strange, 733, 2 Eq. Cas. Abr. p. 524, pl. 7, 1 Dickens, 48. See *Novelli v. Rossi*, 2 Barn. & Adol. 757; *Castrique v. Imrie*, L. R. 4 H. L. 414, 435.

<sup>64</sup> *Hilton v. Guyot*, 159 U. S. 113, 170, 16 Sup. Ct. 139, 40 L. Ed. 95; *Ricardo v. Garcias*, 12 Clark & F. 368; *The Griefswald*, Swab. 430, 435; *Barber v. Lamb*, 8 C. B. (N. S.) 95; *Lea v. Deakin*, 11 Biss. 23, Fed. Cas. No. 8,154.

<sup>65</sup> See *Dupleix v. De Roven*, 2 Vern. 540; *Sinclair v. Fraser*, 2 Pat. App.

tablish that by the law of England, prior to the Declaration of Independence, a judgment recovered in a foreign country for a sum of money, when sued upon in England, was only *prima facie* evidence of the demand, and subject to be examined and impeached.

In the courts of the several states of the Union, it was long ago recognized that by our law, as by the law of England, foreign judgments for debts were not conclusive, but only *prima facie* evidence of the matter adjudged.<sup>66</sup> In more recent times, foreign judgments rendered within the dominions of the English crown, and under the law of England, after a trial on the merits, and where no want of jurisdiction and no fraud or mistake is shown or offered to be shown, have been treated as conclusive by the highest courts of New York, Maine, and Illinois.<sup>67</sup>

In the United States Supreme Court, in the leading case of *Hilton v. Guyot*,<sup>68</sup> from the opinion in which many of the foregoing statements have been taken, it is said on page 202, 159 U. S., and page 158, 16 Sup. Ct. (40 L. Ed. 95), that, "in view of all the authorities upon the subject, and of the trend of judicial opinion in this country and in England, following the lead of Kent and Story, we are satisfied that, where there has been opportunity for a full and fair trial abroad, before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, or on a new trial or appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact."<sup>69</sup>

But both in this country and in England a foreign judgment may

Cas. 253, Mor. Dict. 4542, 1 Doug. 5, note; *Crawford v. Whittall*, 1 Doug. 4, note; *Philips v. Hunter*, 2 H. Bl. 402, 409, 410; *Buchanan v. Rucker*, 1 Camp. 65-67; *Harris v. Saunders*, 4 Barn. & C. 411.

<sup>66</sup> *Bissell v. Briggs*, 9 Mass. 462, 6 Am. Dec. 88; *Middlesex Bank v. Butman*, 29 Me. 19, 21; *Bryant v. Ela*, Smith (N. H.) 396, 404; *Rathbone v. Terry*, 1 R. I. 73, 76; *Hitchcock v. Aicken*, 1 Caines (N. Y.) 460; *Benton v. Burgot*, 10 Serg. & R. (Pa.) 240-242.

<sup>67</sup> *Lazier v. Westcott*, 26 N. Y. 146, 150, 82 Am. Dec. 404; *Dunstan v. Higgins*, 138 N. Y. 70, 74, 33 N. E. 729, 20 L. R. A. 668, 34 Am. St. Rep. 431; *Rankin v. Goddard*, 54 Me. 28, 89 Am. Dec. 718; *Baker v. Palmer*, 83 Ill. 568.

<sup>68</sup> 159 U. S. 113, 16 Sup. Ct. 139, 40 L. Ed. 95.

<sup>69</sup> Also, *Ritchie v. McMullen*, 159 U. S. 235, 16 Sup. Ct. 171, 40 L. Ed. 133.

be impeached for fraud;<sup>70</sup> and judgments rendered in a foreign country by the laws of which our own judgments are reviewable upon the merits (as they are, for example, in France)<sup>71</sup> are not entitled to full credit and conclusive effect when sued upon in a federal court in this country, but are *prima facie* evidence, only, of the justice of the plaintiff's claim. In holding such a judgment, for want of reciprocity, not to be conclusive evidence of the merits of the claim, the court does not proceed upon any theory of retaliation upon one person by reason of injustice done to another, but upon the broad ground that international law is founded upon mutuality and reciprocity, and that by the principles of international law as recognized in most civilized nations, and by the comity of our own country, the judgment of a foreign court which does not consider a judgment of a court of another jurisdiction conclusive is itself not entitled to be considered conclusive here.<sup>72</sup>

In New York, foreign judgments are held conclusive so far as to preclude a retrial upon the merits, although it is competent for the defendant in an action thereon to show that the foreign court had not jurisdiction over the subject-matter of the original suit, or that the defendant was never served with process, or that the judgment was fraudulently obtained.<sup>73</sup> And although, in the cases just cited, the judgments were in fact rendered in England or Canada, it is not suggested that the result would have been otherwise if they had been rendered in a country whose courts do not give like conclusive effect to judgments rendered here. The question whether the "rule of reciprocity" adopted in *Hilton v. Guyot*<sup>74</sup> would be applied in New York does not appear to have been considered.<sup>75</sup>

## (2) *As Between States of the Union*

By the common law, before the American Revolution, all the courts of the several colonies and states were deemed foreign to each other,

<sup>70</sup> *Hilton v. Guyot*, 159 U. S. 113, 206, 16 Sup. Ct. 139, 40 L. Ed. 95; *Vadala v. Lawes*, 25 Q. B. Div. 316; *Duchess of Kingston's Case*, 20 How. St. Tr. 543, note, 2 Smith, Lead. Cas. Eq. 799; *Ochsenbein v. Papelier*, 8 Ch. App. 695; *Messina v. Petrocchino*, L. R. 4 P. C. 144, 157; *Abouloff v. Oppenheimer*, 10 Q. B. Div. 295, 305-308; *Crozat v. Brogden* [1894] 2 Q. B. 30, 34, 35.

<sup>71</sup> *Holker v. Parker*, *Merlin*, *Questions de Droit*, Judgment, § 14, No. 2; *Moreau*, No. 106; *Clunet*, 1882, p. 166, and 1894, p. 913; *Sirey*, 1892, 1, 201, quoted in *Hilton v. Guyot*, 159 U. S., at page 217, 16 Sup. Ct. 139, 40 L. Ed. 95.

<sup>72</sup> *Hilton v. Guyot*, 159 U. S. 113, 210, 228, 16 Sup. Ct. 139, 40 L. Ed. 95.

<sup>73</sup> *Lazier v. Westcott*, 26 N. Y. 146, 151; *Dunstan v. Higgins*, 138 N. Y. 70, 33 N. E. 729, 20 L. R. A. 668, 34 Am. St. Rep. 431; *Grubel v. Nassauer*, 210 N. Y. 149, 103 N. E. 1113, 52 L. R. A. (N. S.) 161.

<sup>74</sup> 159 U. S. 113, 210, 228, 16 Sup. Ct. 139, 40 L. Ed. 95.

<sup>75</sup> See *Nouvion v. Freeman*, 15 App. Cas. 1, 13.

and consequently judgments rendered by any one of them were considered as foreign judgments, and their merits re-examinable in another colony, not only as to the jurisdiction of the court which pronounced them, but also as to the merits of the controversy, to the extent to which they were understood to be re-examinable in England; and, in order to remove that inconvenience, statutes were in some cases passed by which judgments rendered by a court of competent jurisdiction in a neighboring colony could not be impeached.<sup>76</sup>

It was because of that condition of the law, as between the American colonies and states, that the United States, at the beginning of their existence as a nation, ordained that full faith and credit should be given to the judgments of one of the states of the Union in the courts of another of those states.<sup>77</sup> "Full faith and credit shall be given, in each of these states, to the records, acts and judicial proceedings of every other state; and the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."<sup>78</sup> Thereafter Congress, after prescribing the manner of authentication and proof, enacted and the Revised Statutes now provide, that "the said records and judicial proceedings so authenticated, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from which they are taken."<sup>79</sup>

The result of these provisions is that the judgment of a court of one of the states is conclusive in every court (including the federal Circuit and District Courts) within the United States. Thus, in the early case of *Mills v. Duryee*<sup>80</sup> it was held that *nul tiel record*, and not *nil debet*, was a proper plea to an action brought in a federal court in the District of Columbia upon a judgment recovered in a court of the state of New York.<sup>81</sup>

These provisions of the Constitution and laws, however, are necessarily to be read in the light of some established principles, which they were not intended to overthrow. They give no effect to judgments of a court which had no jurisdiction of the subject-matter or of the parties,<sup>82</sup> nor an effect beyond the scope of the jurisdiction which

<sup>76</sup> *Bissell v. Briggs*, 9 Mass. 462, 464, 465, 6 Am. Dec. 88; Story, Const. §§ 1306, 1307.

<sup>77</sup> Articles of Confederation of 1777, art. 4, § 3.

<sup>78</sup> Const. art. 4, § 1.

<sup>79</sup> Rev. St. U. S. § 905 (Comp. St. 1916, § 1519).

<sup>80</sup> 7 Cranch, 481, 484, 485, 3 L. Ed. 411.

<sup>81</sup> *Atlanta Hill Gold Min. & Mill. Co. v. Andrews*, 120 N. Y. 58, 61, 23 N. E. 987; *National Bank of City of Brooklyn v. Wallis*, 59 N. J. Law, 46, 34 Atl. 983.

<sup>82</sup> *Huntington v. Attrill*, 146 U. S. 657, 685, 13 Sup. Ct. 224, 36 L. Ed. 1123; *D'Arcy v. Ketchum*, 11 How. 165, 13 L. Ed. 648; *Thompson v. Whitman*, 18

the court did have in an action, though duly brought before it for certain purposes.<sup>83</sup>

Jurisdiction is the right to adjudicate concerning the subject-matter in the given case. To constitute this there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; and, third, the point decided must be, in substance and effect, within the issues.<sup>84</sup>

In order that a court of one state may acquire jurisdiction in an action in personam against a nonresident, so as to render its judgment binding upon the courts of other states, service must be made within the territorial jurisdiction of the court, or the defendant must voluntarily appear in the action, in order that he may be personally bound; or, if the action is in rem, the property must not only be within the state, but must, by attachment or otherwise, be brought within the control of the court, or the action must in some form be one to reach or dispose of specific property within the state, as in an action to foreclose a mortgage or for partition. In such cases, the judgment is valid to the extent of the property thus affected, but no further.<sup>85</sup>

A judgment rendered in one state, under its local laws upon the subject, may be valid there, and yet, under the principles just stated, be invalid in other states.<sup>86</sup> A law which substitutes constructive for actual service is binding upon persons domiciled within the state, where such law prevails, and as respects the property of others situated there, but can bind neither person nor property beyond its limits.<sup>87</sup>

The appearance of a defendant, in order to obviate the necessity of service, must be general. When he wishes to prevent a judgment by default, by presenting to the court the facts showing its lack of jurisdiction, and at the same time does not intend to subject himself to the jurisdiction of the court, he must "appear specially," for the

Wall. 457, 21 L. Ed. 897; *Grover & Baker Sewing-Mach. Co. v. Radcliffe*, 137 U. S. 287, 294, 11 Sup. Ct. 92, 34 L. Ed. 670.

<sup>83</sup> *Van Cleaf v. Burns*, 133 N. Y. 540, 30 N. E. 661, 15 L. R. A. 542; *Fall v. Eastin*, 215 U. S. 1, 30 Sup. Ct. 3, 54 L. Ed. 65, 23 L. R. A. (N. S.) 924, 17 Ann. Cas. 853.

<sup>84</sup> *Reynolds v. Stockton*, 140 U. S. 254, 268, 11 Sup. Ct. 773, 35 L. Ed. 464; *Hunt v. Hunt*, 72 N. Y. 217, 228, 28 Am. Rep. 129.

<sup>85</sup> *Reed v. Chilson*, 142 N. Y. 152, 36 N. E. 884; *Johnson v. Powers*, 139 U. S. 156, 159, 11 Sup. Ct. 525, 35 L. Ed. 112; *Grover & Baker Sewing-Mach. Co. v. Radcliffe*, 137 U. S. 287, 11 Sup. Ct. 92, 34 L. Ed. 670; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Guthrie v. Lowry*, 84 Pa. 533; *President, etc., of Bank of United States v. Merchants' Bank*, 7 Gill (Md.) 415; *Weaver v. Boggs*, 38 Md. 255. But, as to attachment of choses in action, see p. 434, ante.

<sup>86</sup> *Steel v. Smith*, 7 Watts & S. (Pa.) 447; *Hill v. Bowman*, 14 La. 445.

<sup>87</sup> *Weaver v. Boggs*, 38 Md. 255.

purpose of raising the question of jurisdiction by motion; or he may allow the plaintiff to go on and take judgment by default, without affecting his rights in personam, since no judgment entered without service of process in some form could bind him, and the question of jurisdiction would protect him at any stage of the proceedings for its enforcement, provided it has not been waived by his own act. But if he once appears generally, the court thereupon has jurisdiction of him personally; and if it also has jurisdiction of the subject-matter, he is bound. An answer thereafter interposed by him, raising the question of jurisdiction, is unavailing, and the judgment will be recognized as valid in other states.<sup>88</sup>

The constitutional provision and statute above referred to confer no new jurisdiction on the courts of any state, and therefore, for example, do not authorize them to take jurisdiction of any suit or prosecution of such a penal nature (in the sense elsewhere stated) that it cannot, on settled rules of public policy or international law, be entertained by the judiciary of any other state than that in which the penalty was incurred.<sup>89</sup>

Nor do these provisions put the judgments of other states upon the footing of domestic judgments, to be enforced by execution; but they leave the manner in which they may be enforced to the law of the state in which they may be sued on, pleaded, or offered in evidence.<sup>90</sup> But when duly pleaded and proved<sup>91</sup> in a court of that state, they have the effect of being not merely prima facie evidence, but conclusive proof, of the rights thereby adjudicated; and a refusal to give them the force and effect in this respect which they had in the state in which they were rendered denies to the party a right secured to him by the Constitution and laws of the United States, and by a writ of error from a judgment against the party thus denied such rights the case may be taken to the United States Supreme Court for review, where the judgment will be reversed and the case remanded for further proceedings.<sup>92</sup> In short, judgments recovered in one state of the Union, when proved in the courts of another, differ from judgments recovered in a foreign country in no other respect than that of not being examinable upon the merits, if there was no fraud in obtain-

<sup>88</sup> *Reed v. Chilson*, 142 N. Y. 152, 36 N. E. 884.

<sup>89</sup> *Huntington v. Attrill*, 146 U. S. 657, 685, 13 Sup. Ct. 224, 36 L. Ed. 1123.

<sup>90</sup> *McElmoyle v. Cohen*, 13 Pet. 312, 325, 10 L. Ed. 177; *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 292, 8 Sup. Ct. 1370, 32 L. Ed. 239.

<sup>91</sup> *Ensign v. Kindred*, 163 Pa. 638, 30 Atl. 274.

<sup>92</sup> *Huntington v. Attrill*, 146 U. S. 657, 685, 13 Sup. Ct. 224, 36 L. Ed. 1123; *Christmas v. Russell*, 5 Wall. 290, 18 L. Ed. 475; *Green v. Van Buskirk*, 5 Wall. 307, 18 L. Ed. 599; *Id.*, 7 Wall. 139, 19 L. Ed. 109; *Carpenter v. Strange*, 141 U. S. 87, 11 Sup. Ct. 960, 35 L. Ed. 640.



ing them and if rendered by a court having jurisdiction of the cause and of the parties.<sup>93</sup>

But as to whether fraud in procuring a judgment in one state may be a ground for the refusal of the courts of another state to recognize it, the cases just cited may be compared with *Hunt v. Hunt*<sup>94</sup> and *White v. Reid*.<sup>95</sup> The seeming discrepancy is apparently explainable on the ground that where any question of fraud is involved in the original action, and has been, or might have been, passed on and decided by the court, the same question cannot be reopened for examination in a subsequent action upon the judgment in another state, while if the original judgment was procured by fraud, consisting in preventing the unsuccessful party from fully exhibiting his case, by fraud or deception practiced upon him by his opponent, the facts establishing such fraud may be shown in an action upon the judgment in another state.<sup>96</sup>

## 22. JUDGMENTS IN REM AND IN PERSONAM

A judgment in rem binds only the property within the control of the court which rendered it, and a judgment in personam binds only the parties to that judgment and those in privity with them.<sup>97</sup> Thus, a judgment recovered against the administrator of a deceased person in one state is no evidence of a debt, in a subsequent suit by the same plaintiff in another state, either against an administrator (whether the same or a different person) appointed there, or against any other person having assets of the deceased; for the original defendant's representation of his intestate is a qualified one, and extends not beyond the assets of which the ordinary, or other officer or court, from whom he receives his authority, had jurisdiction.<sup>98</sup>

<sup>93</sup> *Hanley v. Donoghue*, 116 U. S. 1, 4, 6 Sup. Ct. 242, 29 L. Ed. 535; *Christmas v. Russell*, 5 Wall. 290, 305, 18 L. Ed. 475; *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 292, 8 Sup. Ct. 1370, 32 L. Ed. 239; *Hilton v. Guyot*, 159 U. S. 113, 184, 185, 16 Sup. Ct. 139, 40 L. Ed. 95; *Mooney v. Hinds*, 160 Mass. 469, 36 N. E. 484.

<sup>94</sup> 72 N. Y. 217, 225, 28 Am. Rep. 129.

<sup>95</sup> 70 Hun, 197, 24 N. Y. Supp. 290.

<sup>96</sup> *White v. Reid*, 70 Hun, 197, 24 N. Y. Supp. 290; *Mooney v. Hinds*, 160 Mass. 469, 36 N. E. 484; *National Bank of City of Brooklyn v. Wallis*, 59 N. J. Law, 46, 34 Atl. 983. And for comparison of the rule in case of judgments of a foreign country, see *Vadala v. Lawes*, 25 Q. B. Div. 310, 316.

<sup>97</sup> *Johnson v. Powers*, 139 U. S. 156, 159, 11 Sup. Ct. 525, 35 L. Ed. 112; *Hilton v. Guyot*, 159 U. S. 113, 167, 16 Sup. Ct. 139, 40 L. Ed. 95; *China Mut. Ins. Co. v. Force*, 142 N. Y. 90, 95, 36 N. E. 874, 40 Am. St. Rep. 576; *Reed v. Chilson*, 142 N. Y. 152, 36 N. E. 884.

<sup>98</sup> *Johnson v. Powers*, 139 U. S. 156, 159, 11 Sup. Ct. 525, 35 L. Ed. 112;

## 23. EFFECT OF STATE LAWS ON ABSENT CITIZEN

A citizen of a state is so far bound by its laws, in consequence of the allegiance which he owes to it, that, even though he is absent, he is bound upon a judgment rendered against him, without personal service, but by some form of advertisement or other substituted service, which is recognized as valid by the laws of his state.<sup>99</sup>

## 24. INTRATERRITORIAL OPERATION OF LAWS

"All laws duly made and published by a state bind all persons and things within that state."<sup>1</sup> A citizen of a state, going into another state, owes a temporary allegiance to the latter state, and is bound by its laws, and is amenable to its courts. If in such a case he is not served with process, he is not bound to appear in the action. He can stand aloof, and so long as he does so he could not be affected by the proceeding; but if he chooses to avail himself of the right, given by the laws of the state where the action is brought, to file an answer, and contest the claim of the plaintiff, he is bound by the consequences which the local laws affix to such a proceeding—as, for instance, a provision that such steps shall be deemed equivalent to an appearance in the action, and shall dispense with the service of citation.<sup>2</sup>

## 25. FOREIGN MARRIAGES

The English rule seems to be that it is indispensable to the validity of a marriage that the *lex loci actus* be satisfied, (1) so far as regards the forms or ceremonies; (2) so far as regards the consent of parents or guardians; (3) so far as regards the capacity of the parties to contract it—whether in respect of the prohibited degrees of affinity or in respect of any other cause of incapacity, whether ab-

Stacy v. Thrasher, 6 How. 44, 12 L. Ed. 337; Low v. Bartlett, 8 Allen (Mass.) 259.

<sup>99</sup> Douglas v. Forrest, 4 Bing. 686; Becquet v. MacCarthy, 2 Barn. & Adol. 951; Martin v. Nicolls, 3 Sim. 458; Schibsky v. Westenholz, L. R. 6 Q. B. 155. See Hunt v. Hunt, 72 N. Y. 217, 238, 28 Am. Rep. 129.

But see Grubel v. Nassauer, 210 N. Y. 149, 103 N. E. 1113, 52 L. R. A. (N. S.) 161, where the New York court refuses to recognize a personal judgment, without personal service, rendered in Germany against a German subject domiciled in New York.

<sup>1</sup> Story, Conf. Laws, § 395; Companhia de Mocambique v. British South Africa Co., [1892] 2 Q. B. 394, 395; Allen v. Buchanan, 97 Ala. 399, 11 South. 777, 38 Am. St. Rep. 187.

<sup>2</sup> Jones v. Jones, 108 N. Y. 415, 427, 15 N. E. 707, 2 Am. St. Rep. 447; Bissell v. Briggs, 9 Mass. 464, 6 Am. Dec. 88.

solute or relative.<sup>3</sup> But the fact that it does in these respects comply with the *lex loci actus* is not necessarily conclusive of its validity in England.

As a general proposition, the validity of a marriage contract is to be determined by the law of the state where it is entered into. If valid there, it is valid everywhere, unless contrary to the prohibitions of natural law or the express prohibitions of a statute of the state where its validity is brought in issue.<sup>4</sup> There are exceptions to this rule—cases, first, of incest or polygamy, coming within the prohibitions of natural law;° second, of prohibition by positive law. Thus, a state might provide that a marriage by one of its own citizens, without the state, after a decree of divorce had been granted against him in the state, in favor of a former wife, should be void. But, in the absence of any such express provision, a mere prohibition upon his marrying again would not have such an effect. Thus, if A. procures a decree of absolute divorce against B., in New York, where the statute provides that the defendant in such case shall not marry again until the death of the plaintiff, yet if B. does go to New Jersey, even though for the express purpose of marrying there, and the marriage there celebrated is valid under the laws of New Jersey, it will be valid for all purposes in New York.<sup>6</sup>

## 26. FOREIGN DIVORCES

As elsewhere stated, jurisdiction over personal status is governed by the law of domicile, and while the domicile of a husband usually determines that of the wife, this does not apply in actions for divorce based on the husband's wrong. The leading classes of cases involving the validity in one state of a divorce granted in another will now be considered:

(a) In the case of a divorce granted in a state where both parties had their domicile at the time the action was commenced, if the de-

<sup>3</sup> Westl. Priv. Int. Law, 53, 54.

<sup>4</sup> *Rex v. Machado*, 4 Russ. 225; *Potter v. Brown*, 5 East, 130; *Warrender v. Warrender*, 2 Clark & F. 529, 530; *Connelly v. Connelly*, 2 Eng. Law & Eq. 570; *Dalrymple v. Dalrymple*, 2 Hagg. Consist. 54; *Thorp v. Thorp*, 90 N. Y. 602, 43 Am. Rep. 189; *Van Voorhis v. Brintnall*, 86 N. Y. 18, 40 Am. Rep. 505; *Parton v. Hervey*, 1 Gray (Mass.) 119; *Dickson v. Dickson's Heirs*, 1 Yerg. (Tenn.) 110, 24 Am. Dec. 444; *Stevenson v. Gray*, 17 B. Mon. (Ky.) 193.

<sup>5</sup> *Wightman v. Wightman*, 4 Johns. Ch. (N. Y.) 343; *Hutchins v. Kimmell*, 31 Mich. 133, 18 Am. Rep. 164.

<sup>6</sup> *Van Voorhis v. Brintnall*, 86 N. Y. 18, 40 Am. Rep. 505; *Thorp v. Thorp*, 90 N. Y. 602, 43 Am. Rep. 189; *Com. v. Lane*, 113 Mass. 458, 18 Am. Rep. 509; *Putnam v. Putnam*, 8 Pick. (Mass.) 433; *Com. v. Hunt*, 4 Cush. (Mass.) 49; *Sutton v. Warren*, 10 Metc. (Mass.) 453.

fendant was served personally with process within the territorial jurisdiction, or voluntarily appeared in the action, the divorce is regarded everywhere as valid and binding; and if, in such a case, the defendant was neither so served nor appeared in the action, but was served by publication or by other substituted service sufficient under the laws of the state where the decree was granted, and where both parties were domiciled, the decree is still entitled to full credit everywhere.<sup>7</sup>

(b) In the case of a divorce granted in a state where only the plaintiff is domiciled, and the defendant appeared in the action, or was served with process within the territorial jurisdiction, the decree is still accorded extraterritorial effect.<sup>8</sup> But if, in such a case, the non-resident defendant does not appear in the action, and is not served with process within the territorial jurisdiction, the question of whether a decree of divorce is of binding effect without the state where it is rendered is the subject of a sharp difference of opinion, and the decisions in different courts are diametrically opposed. The New York doctrine is that such a decree, rendered in another state, is invalid in New York.<sup>9</sup>

The opposite doctrine is adopted in many states, where it is held that the courts of a state where the plaintiff resides, although the defendant resides elsewhere, are empowered to determine the status of its citizen, and hence to establish such status, by a decree of divorce, as that of an unmarried person; and that, as one party to the marriage cannot be a single person while the other continues to be a married person, the status of both is thereby determined.<sup>10</sup>

<sup>7</sup> *Hunt v. Hunt*, 72 N. Y. 217, 241, 28 Am. Rep. 129; *Campbell v. Campbell*, 90 Hun, 233, 35 N. Y. Supp. 280, 693; *In re Denick*, 92 Hun, 161, 36 N. Y. Supp. 518; *Bissell v. Briggs*, 9 Mass. 464, 6 Am. Dec. 88; *Ditson v. Ditson*, 4 R. I. 107; *Hood v. Hood*, 11 Allen (Mass.) 196, 87 Am. Dec. 709; *Cooper v. Reynolds*, 10 Wall. 308, 19 L. Ed. 931.

<sup>8</sup> *Jones v. Jones*, 108 N. Y. 415, 15 N. E. 707, 2 Am. St. Rep. 447; *Rich v. Rich*, 88 Hun, 566, 34 N. Y. Supp. 854; *Bissell v. Briggs*, 9 Mass. 464, 6 Am. Dec. 88.

<sup>9</sup> *People v. Baker*, 76 N. Y. 78, 32 Am. Rep. 274; *O'Dea v. O'Dea*, 101 N. Y. 23, 4 N. E. 110; *Rigney v. Rigney*, 127 N. Y. 408, 28 N. E. 405, 24 Am. St. Rep. 462 (reversed, on another point, 160 U. S. 531, 16 Sup. Ct. 366, 40 L. Ed. 525); *Williams v. Williams*, 130 N. Y. 193, 29 N. E. 98, 14 L. R. A. 220, 27 Am. St. Rep. 517; *In re Kimball*, 155 N. Y. 62, 49 N. E. 331; *Atherton v. Atherton*, 155 N. Y. 129, 49 N. E. 933, 40 L. R. A. 291, 63 Am. St. Rep. 650; *People v. Karlsioe*, 1 App. Div. 571, 37 N. Y. Supp. 481. Also, *Cook v. Cook*, 56 Wis. 195, 14 N. W. 33, 443, 43 Am. Rep. 706. Compare the dicta in *Maynard v. Hill*, 125 U. S. 190, 8 Sup. Ct. 723, 31 L. Ed. 654; *Cheely v. Clayton*, 110 U. S. 701, 4 Sup. Ct. 328, 28 L. Ed. 298; *Cheever v. Wilson*, 9 Wall. 103, 19 L. Ed. 604; *Pennoyer v. Neff*, 95 U. S. 714, 734, 735, 24 L. Ed. 565.

<sup>10</sup> *Anthony v. Rice*, 110 Mo. 223, 19 S. W. 423; *Felt v. Felt*, 57 N. J. Eq.

The United States Supreme Court recognizes that there is room for difference of opinion as to whether a court has jurisdiction merely because the plaintiff has acquired a separate domicile within the state; but where the plaintiff's domicile is the matrimonial domicile, where the parties had lived together up to the time of separation, then the res, or marriage status, is unquestionably before the court, so that it may render a judgment in rem which must be accepted as valid in other states under the full faith and credit clause of the United States Constitution.<sup>11</sup> The result is that, if one spouse leaves the other at the matrimonial domicile and acquires a separate domicile, a divorce procured without personal service by the remaining spouse must be recognized in other states, but a divorce thus procured by the departing spouse need not.

If neither spouse is domiciled within the jurisdiction a divorce without personal service does not bind the defendant.<sup>12</sup>

#### *Effect on Dower*

The effect which a divorce granted by the courts of a state has upon lands of the husband in that state must be determined by its laws; but the effect which it has upon his lands in another state must be determined by the laws of the latter state. Thus, if a divorce be procured in Illinois, on the ground of abandonment, and the result, by the laws of that state, is to deprive the wife of dower, she is not thereby deprived of her dower in lands in New York, where such a result follows only from an absolute divorce, founded on the one ground recognized therefor in the latter state.<sup>13</sup>

101, 40 Atl. 436; *State v. Schlachter*, 61 N. C. 520; *Ditson v. Ditson*, 4 R. I. 87; *Harrison v. Harrison*, 19 Ala. 499; *Beard v. Beard*, 21 Ind. 321.

<sup>11</sup> *Haddock v. Haddock*, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1. And see *Atherton v. Atherton*, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. Ed. 794, limiting the New York doctrine to this extent.

<sup>12</sup> *Bell v. Bell*, 181 U. S. 175, 21 Sup. Ct. 551, 45 L. Ed. 804; *Streitwolf v. Streitwolf*, 181 U. S. 179, 21 Sup. Ct. 553, 45 L. Ed. 807.

<sup>13</sup> *Van Cleaf v. Burns*, 133 N. Y. 540, 30 N. E. 661, 15 L. R. A. 542. See, also, *Doerr v. Forsythe*, 50 Ohio St. 726, 35 N. E. 1055, 40 Am. St. Rep. 703; *Van Blaricum v. Larson*, 205 N. Y. 355, 98 N. E. 488, 41 L. R. A. (N. S.) 219, Ann. Cas. 1913E, 553.



# DAMAGES

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## DEFINITION AND NATURE

1. Damages are the pecuniary reparation which the law compels a wrongdoer to make to the person injured by his wrong.

Wherever the common law recognizes a right, it also gives a remedy for its violation.<sup>1</sup>

“Ubi jus, ibi remedium.” “Right” and “remedy” are correlative terms. Remedies are either preventive of threatened wrongs, or redressive of wrongs committed. Redressive remedies may afford specific relief, as where one is compelled to do the very thing he agreed to do, or they may afford merely a pecuniary reparation, as where a money award is given in lieu of the thing agreed to be done. Common-law remedies, with few exceptions,<sup>2</sup> are of the latter kind. For most wrongs, an award of a pecuniary recompense is the sole remedy afforded. Equity may prevent threatened wrongs by injunction, or afford specific relief; but at common law almost the sole power of the court is to make and enforce a money judgment.

## THE THEORY OF DAMAGES

2. The theory upon which damages are awarded in civil actions is that they are an indemnity to the person injured, not a punishment to the wrongdoer.

**EXCEPTION**—Where a tort is accompanied by circumstances of fraud, gross negligence, malice, or oppression, exemplary damages are sometimes awarded as a punishment to the offender.

### *Compensation the Rule*

Compensation is the fundamental and all-pervasive principle governing the award of damages.<sup>3</sup>

Compensation, not restitution, value, not cost, is the measure of relief.<sup>4</sup>

<sup>1</sup> 3 Bl. Comm. p. 123, c. 8; *Ashby v. White*, 1 Salk. 19, 21; *Yates v. Joyce*, 11 Johns. (N. Y.) 136, 140.

<sup>2</sup> *Replevin*, *detinue*, *ejectment*, proceedings to recover dower, abatement of nuisance, *quo warranto*, *mandamus*, prohibition, *habeas corpus*, *estrepement*, and the obsolete *brevia anticipantia*. See 1 Co. Litt. 100a; Story, Eq. Jur. §§ 730, 825.

<sup>3</sup> *Filliter v. Phippard*, 12 Jur. 202, 204, 11 Adol. & E. (N. S.) 347, 356; *Smith v. Sherwood*, 2 Tex. 460; *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718; *Mechem*, Cas. Dam. 74; *Robinson v. Harman*, 1 Exch. 850.

<sup>4</sup> Pol. Torts, c. 5, citing *Whitham v. Kershaw*, 16 Q. B. Div. 613. See, also,



Whether the action be *ex contractu* or *ex delicto*, the end in view is the same—that plaintiff be made whole. “In civil actions, the law awards to the party injured a just indemnity for the wrong which has been done him, and no more, whether the action be in contract or tort. Except in those special cases where punitive damages are allowed, the inquiry must always be, What is an adequate indemnity to the party injured? And the answer to that question cannot be affected by the form of action in which he seeks his remedy.” In an action for breach of contract of carriage, “what the passenger is entitled to recover is the difference between what he ought to have had and what he did have.”<sup>5</sup>

Damages for breach of contract are not limited by the consideration paid.<sup>6</sup>

### *Measure of Damages*

(a) The measure of damages in actions for conversion is ordinarily the market price of the property converted, at the time and place of conversion, with interest.<sup>7</sup> But the rule is subject to modification under special circumstances,<sup>8</sup> since compensation is always the aim of the court in awarding damages.

In an action against a stock broker by his customer for conversion of stocks, the measure of damages in some jurisdictions is the highest value intermediate the conversion and the end of the trial; while in others the measure is the highest price reached within a reasonable time after the plaintiff had learned of the conversion. The latter view

Snell v. Delaware Ins. Co., 4 Dall, 430, 1 L. Ed. 896; Quinn v. Van Pelt, 56 N. Y. 417. Cf. Waters v. Greenleaf-Johnson Lumber Co., 115 N. C. 648, 20 S. E. 718. In an action in tort for wrongful conversion of notes intrusted to the defendant under a contract which defendant has violated by the misappropriation, he cannot resort to the contract thus abandoned to establish the measure of damages. Hynes v. Patterson, 95 N. Y. 1, 6.

<sup>5</sup> Hobbs v. Railroad Co., L. R. 10 Q. B. 111, 120.

<sup>6</sup> Quinn v. Van Pelt, 56 N. Y. 417; Bennett v. Buchan, 61 N. Y. 222.

<sup>7</sup> Spicer v. Waters, 65 Barb. (N. Y.) 227; Allen v. Dykers, 3 Hill (N. Y.) 593; Phillips v. Speyers, 49 N. Y. 653; Tyng v. Commercial Warehouse Co. of New York, 58 N. Y. 308; Parmenter v. Fitzpatrick, 135 N. Y. 190, 31 N. E. 1032; Hawver v. Bell, 141 N. Y. 140, 36 N. E. 6; Ormsby v. Vermont Copper Mining Co., 56 N. Y. 623; Fowler v. Merrill, 11 How. 375, 13 L. Ed. 736; Barry v. Bennett, 7 Mete. (Mass.) 354; Falk v. Fletcher, 18 C. B. (N. S.) 403; Lyon v. Gormley, 53 Pa. 261; Jenkins v. McConico, 26 Ala. 213; Hautala v. Dover, 176 Mich. 336, 142 N. W. 579; Drumm-Flato Commission Co. v. Edmisson, 208 U. S. 534, 28 Sup. Ct. 367, 52 L. Ed. 606; Smyth v. Stoddard, 203 Ill. 424, 67 N. E. 980, 96 Am. St. Rep. 314; Pierce v. O'Brien, 189 Mass. 58, 75 N. E. 61; McIntyre v. Whitney, 139 App. Div. 557, 124 N. Y. Supp. 234.

<sup>8</sup> See Sutherland, Dam. (4th Ed.) § 1109.

is adopted in New York;<sup>9</sup> and in the United States Supreme Court;<sup>10</sup> and in Pennsylvania if there was a trust relation between the parties, and justice cannot be reached by the ordinary measure of damages.<sup>11</sup>

In an action for conversion of bills and notes, the amount appearing to be unpaid thereon at the time of the conversion, with interest, is *prima facie* the measure of damages; but this may be reduced by showing invalidity, payment, or insolvency of the maker.<sup>12</sup>

(b) In an action of replevin, the measure of damages is, generally speaking, the same as in trover; that is, the result is the same—compensation for the deprivation of the chattel; which is measured in the absence of special circumstances by the value of the chattel at the time of conversion, plus interest.<sup>13</sup> But the action is everywhere regulated by statute; and the procedure, and hence the method of computation by which the result is reached, varies in the several states.<sup>14</sup> In New York, for instance, the plaintiff, if he succeeds, gets judgment for the recovery of the chattel with damages for its detention and depreciation; and, if the chattel cannot be had, then its present value as assessed by the jury.<sup>15</sup>

(c) The measure of damages in an action by a vendee against a vendor of personal property, for breach of the contract, is stated and dis-

<sup>9</sup> *Baker v. Drake*, 53 N. Y. 211, 13 Am. Rep. 507; *Wright v. Bank of the Metropolis*, 110 N. Y. 237, 18 N. E. 79, 1 L. R. A. 289, 6 Am. St. Rep. 356. Compare *Barnes v. Brown*, 130 N. Y. 382, 29 N. E. 760. And see *Smith v. Savin*, 141 N. Y. 315, 36 N. E. 338.

Value at time of conversion, if that is higher. *McIntyre v. Whitney*, *supra*.

<sup>10</sup> *Galigher v. Jones*, 129 U. S. 193, 9 Sup. Ct. 335, 32 L. Ed. 658, where the various authorities are reviewed.

This rule is followed in Connecticut, New Jersey and many other states; but there is much conflict. *Sutherland, Dam.* (4th Ed.) p. 4244.

<sup>11</sup> *Huntingdon & B. T. R. & Coal Co. v. English*, 86 Pa. 247. And see *In re Jamison & Co.'s Estate*, 163 Pa. 143, 29 Atl. 1001; *Galigher v. Jones*, 129 U. S. 193, 9 Sup. Ct. 335, 32 L. Ed. 658.

The latest Pennsylvania cases follow the rule first above stated. *Learock v. Paxson*, 208 Pa. 602, 57 Atl. 1097; *Sproul v. Sloan*, 241 Pa. 284, 88 Atl. 501, Ann. Cas. 1915B, 941.

As to the many modifications of these rules in the various jurisdictions, see *Sutherland, Dam.* (4th Ed.) p. 4239 et seq.

<sup>12</sup> *Griggs v. Day*, 136 N. Y. 160, 32 N. E. 612, 18 L. R. A. 120, 32 Am. St. Rep. 704; *Stevens v. Wiley*, 165 Mass. 402, 43 N. E. 177; *Latham v. Brown*, 16 Iowa, 118; 3 Pars. Notes & B. 196. Cf. *Booth v. Powers*, 56 N. Y. 22; *Derl v. Union Bank of Brooklyn*, 65 Misc. Rep. 531, 120 N. Y. Supp. 813.

<sup>13</sup> *Suydam v. Jenkins*, 3 Sandf. (N. Y.) 614; *Schnitzer v. Russell*, 81 N. J. Law, 146, 80 Atl. 938; *Clark v. Martin*, 120 Mass. 543.

<sup>14</sup> See *Sutherland, Dam.* (4th Ed.) § 1147 et seq.

<sup>15</sup> *Allen v. Fox*, 51 N. Y. 562, 10 Am. Rep. 641; *Redmond v. American Mfg. Co.*, 121 N. Y. 415, 24 N. E. 924.

cussed in *Tiff. Sales*, § 127 et seq.<sup>16</sup> Ordinarily it is the excess of the market price over the contract price at the time and place of delivery.<sup>17</sup>

(d) The measure of damages for breach of warranty is the difference between the actual value of the article and its value if it had conformed with the warranty, and not the difference between its purchase price and the actual value.<sup>18</sup>

(e) The measure of damages in actions by a vendor of personal property against a vendee is stated and discussed in *Tiff. Sales*, § 123 et seq.<sup>19</sup>

It depends largely upon circumstances. Ordinarily, where the seller retains the goods, he recovers the excess of the contract price over the market price at the time and place of delivery.<sup>20</sup>

(f) Where a breach of contract by one party prevents performance by the other, the latter is entitled to recover the amount of expenses which he has properly incurred in preparing and providing for performance, and which were naturally to be anticipated.<sup>21</sup>

(g) In some states, in an action of ejectment to recover the possession of land wrongfully held by another, no damage for the wrongful detention can be recovered.<sup>22</sup>

To recover his substantial damages, the plaintiff must resort to a subsequent action of trespass for mesne profits.<sup>23</sup>

But in other states the possession and damages for the detention are

<sup>16</sup> See, also, *Theiss v. Weiss*, 166 Pa. 9, 31 Atl. 63, 45 Am. St. Rep. 638.

<sup>17</sup> See *Hale, Dam.* (2d Ed.) p. 355; *Dustan v. McAndrew*, 44 N. Y. 73.

<sup>18</sup> *Park v. Richardson & Boynton Co.*, 91 Wis. 189, 64 N. W. 859; *Sharpe v. Bettis* (Ky.) 32 S. W. 395; *Himes v. Kiehl*, 154 Pa. 190, 25 Atl. 632; *Ogden v. Beatty*, 137 Pa. 197, 20 Atl. 620, 21 Am. St. Rep. 862; *Carroll-Porter Boiler & Tank Co. v. Columbus Mach. Co.*, 5 C. C. A. 190, 55 Fed. 451; *Bach v. Levy*, 101 N. Y. 511, 5 N. E. 345; *Beeman v. Banta*, 118 N. Y. 538, 23 N. E. 887, 16 Am. St. Rep. 779; *Swain v. Schieffelin*, 134 N. Y. 471, 31 N. E. 1025, 18 L. R. A. 385; *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13; *Id.*, 78 N. Y. 393, 34 Am. Rep. 544. But see *Jones v. Ross*, 98 Ala. 448, 13 South. 319. See *Hale, Dam.* (2d Ed.) p. 363.

As to the damages under special circumstances, which were in contemplation when the contract was made, see *Hale, Dam.* (2d Ed.) p. 367; *Swain v. Schieffelin*, 134 N. Y. 471, 31 N. E. 1025, 18 L. R. A. 385.

<sup>19</sup> See, also, *Tufts v. Grewer*, 83 Me. 407, 22 Atl. 382; *Todd v. Gamble*, 148 N. Y. 382, 42 N. E. 982, 52 L. R. A. 225; *Mason v. Decker*, 72 N. Y. 595, 28 Am. Rep. 190; *Dustan v. McAndrew*, 44 N. Y. 73; *Tufts v. Bennett*, 163 Mass. 398, 40 N. E. 172; *Van Brocklen v. Smeallie*, 140 N. Y. 75, 35 N. E. 415. But see *Gordon v. Norris*, 49 N. H. 376.

<sup>20</sup> See *Hale, Dam.* (2d Ed.) p. 350.

<sup>21</sup> *Bernstein v. Meech*, 130 N. Y. 359, 29 N. E. 255; *Friedland v. Myers*, 139 N. Y. 438, 34 N. E. 1055.

<sup>22</sup> *Goodtitle v. Tombs*, 3 Wils. 118; *Harvey v. Snow*, 1 Yeates (Pa.) 156.

<sup>23</sup> *Mitchell v. Mitchell*, 1 Md. 55.

recovered in one action—either ejectment,<sup>24</sup> or trespass to try title,<sup>25</sup> or in a similar statutory action.

In both classes of states the measure of damages is the same. It is the annual value of the premises;<sup>26</sup> not what the occupant actually received, but what should have been received.<sup>27</sup>

The defendant may deduct, from the amount received as the income of the land, necessary expenses paid by him, such as taxes,<sup>28</sup> and repairs.<sup>29</sup>

When the occupant has made valuable improvements on the land, which will be a benefit, their value may be set off against the claim for damages.<sup>30</sup>

The improvements must have been made, however, by one who acted in good faith, believing that he had title to the land, or no allowance will be made.<sup>31</sup>

The plaintiff, in an action for mesne profits, may recover damages from the time his right to possession accrued,<sup>32</sup> up to the time the defendant gives up the possession.<sup>33</sup>

This is the rule in the absence of some statute of limitations applicable to such actions.<sup>34</sup>

<sup>24</sup> *Compton v. The Chelsea*, 139 N. Y. 538, 34 N. E. 1090, in which the New York statutes (Code Civ. Proc. §§ 1496, 1497, 1531), and other provisions, including those relating to treble damages in certain cases, are discussed.

<sup>25</sup> *Boyd's Lessee v. Cowan*, 4 Dall. 138, 1 L. Ed. 774; *Battin v. Bigelow*, Pet. C. C. 452, Fed. Cas. No. 1,108.

<sup>26</sup> *New Orleans v. Gaines*, 15 Wall. 624, 21 L. Ed. 215; *Larwell v. Stevens* (C. C.) 12 Fed. 559; *Woodhull v. Rosenthal*, 61 N. Y. 382; *Taylor v. Taylor*, 43 N. Y. 578; *Ege v. Kille*, 84 Pa. 333.

<sup>27</sup> *Woodhull v. Rosenthal*, 61 N. Y. 382; *Campbell v. Brown*, 2 Woods, 349, Fed. Cas. No. 2,355. But see *Rabb v. Patterson*, 42 S. C. 528, 20 S. E. 540, 46 Am. St. Rep. 743; *McMahan v. Bowe*, 114 Mass. 140, 19 Am. Rep. 321. See *Hale, Dam.* (2d Ed.) p. 493; *Sutherland, Dam.* (4th Ed.) c. XXIV.

<sup>28</sup> *Wallace v. Berdell*, 101 N. Y. 13, 3 N. E. 769; *Ringhouse v. Keener*, 63 Ill. 230; *Semple v. Bank of British Columbia*, 5 Sawy. 394, Fed. Cas. No. 12,660.

<sup>29</sup> *Semple v. Bank of British Columbia*, 5 Sawy. 394, Fed. Cas. No. 12,660. And see *Ewalt v. Gray*, 6 Watts (Pa.) 427.

<sup>30</sup> *Green v. Biddle*, 8 Wheat. 1, 5 L. Ed. 547; *Woodhull v. Rosenthal*, 61 N. Y. 396; *Bedell v. Shaw*, 59 N. Y. 46; *Jackson v. Loomis*, 4 Cow. (N. Y.) 168, 15 Am. Dec. 347; *Hodgkins v. Price*, 141 Mass. 162, 5 N. E. 502.

<sup>31</sup> *Campbell v. Brown*, 2 Woods, 349, Fed. Cas. No. 2,355; *Dothage v. Stuart*, 35 Mo. 251; Code Civ. Proc. N. Y. § 1531.

<sup>32</sup> *Danziger v. Boyd*, 120 N. Y. 628, 24 N. E. 482; *Clark v. Boyreau*, 14 Cal. 634.

<sup>33</sup> *Danziger v. Boyd*, 120 N. Y. 628, 24 N. E. 482; *Gilman v. Gilman*, 111 N. Y. 265, 18 N. E. 849; *Mitchell v. Freedley*, 10 Pa. 198.

<sup>34</sup> *New Orleans v. Gaines*, 15 Wall. 624, 21 L. Ed. 215.

But in most states the right of recovery is limited to a few years before the action is begun;<sup>35</sup> generally, six years.<sup>36</sup>

Where, owing to the technical form of the action of ejectment, no costs were recovered, they may be made a part of the damages in a subsequent action for mesne profits.<sup>37</sup>

In England, reasonable counsel fees in the ejectment action may be recovered.<sup>38</sup>

The same has been held in this country in some cases,<sup>39</sup> and denied in others.<sup>40</sup>

(h) Damages for detention of dower were first made recoverable by the statute of Merton;<sup>41</sup> and the subject is largely regulated by statute in the United States.<sup>42</sup>

The amount of damages is computed on the same basis as for the detention of real property in other cases; that is, the net value of the land. But, in the case of a widow suing for detention of dower, only one-third of the husband's whole estate is recoverable, that being the share of her husband's land to which she is entitled by the common law.<sup>43</sup>

(i) Against an alienee of the husband, damages can only be recovered from the time of demand.<sup>44</sup>

As to an alienee of the heir, the rule is not uniform.<sup>45</sup>

<sup>35</sup> *Gatton v. Tolley*, 22 Kan. 678; *Ringhouse v. Keener*, 63 Ill. 230. But see *Budd v. Walker*, 9 Barb. (N. Y.) 493; *Gaslight Co. v. Rome, W. & O. R. Co.*, 51 Hun, 119, 5 N. Y. Supp. 459.

<sup>36</sup> *Jackson v. Wood*, 24 Wend. (N. Y.) 443; *Hill v. Meyers*, 46 Pa. 15.

<sup>37</sup> *Baron v. Abell*, 3 Johns. (N. Y.) 481, 3 Am. Dec. 515; *Pearse v. Coaker*, L. R. 4 Exch. 92. But see *Hunt v. O'Neill*, 44 N. J. Law, 564; *Doe v. Filliter*, 13 Mees. & W. 47.

<sup>38</sup> *Doe v. Huddart*, 4 Dowl. 437.

<sup>39</sup> *Doe ex rel. Trustees of Augusta v. Perkins*, 8 B. Mon. (Ky.) 198; *Den ex dem. Delatouche v. Chubb*, 1 N. J. Law, 466. And see *Gibson, C. J.*, in *Alexander v. Herr's Ex'rs*, 11 Pa. 537, 539.

<sup>40</sup> *Herreshoff v. Tripp*, 15 R. I. 92, 23 Atl. 104; *White v. Clack*, 2 Swan (Tenn.) 230; *Alexander v. Herr's Ex'rs*, 11 Pa. 537.

<sup>41</sup> 20 Hen. III, c. 1.

<sup>42</sup> See 1 Stim. Am. St. Law, § 3278; 2 Scrib. Dower (2 Ed.) 700; 3 Pars. Cont. 222; Code Civ. Proc. N. Y. § 1600. See *Sutherland, Dam.* (4th Ed.) § 1003.

<sup>43</sup> *Rea v. Rea*, 63 Mich. 257, 29 N. W. 703; *Henderson v. Chaires*, 35 Fla. 423, 17 South. 574; *Stull v. Graham*, 60 Ark. 461, 31 S. W. 46.

<sup>44</sup> *McClanahan v. Porter*, 10 Mo. 746; *Thrasher v. Tyack*, 15 Wis. 256. That no damages are recoverable, see *Sharp v. Pettit*, 3 Yeates (Pa.) 38; *Gannon v. Widman*, 3 Pa. Dist. R. 835; *Marshall v. Anderson*, 1 B. Mon. (Ky.) 198.

<sup>45</sup> As holding damages recoverable from husband's death, see 2 Scrib. Dower (2d Ed.) 715; *Seaton v. Jamison*, 7 Watts (Pa.) 533; *Hitchcock v.*

*Market Value*

The market value is the fair cash value if sold in the market for cash, and not on time.<sup>46</sup>

A single sale will not usually establish a market value.<sup>47</sup>

*Value in Nearest Market*

Where there is no market for the article at the place where its value is to be estimated, the value at the nearest market is taken as a basis, and an allowance is made for the cost of transportation, the object being to ascertain the real value at the place of compensation.<sup>48</sup>

*Value of Property in Course of Manufacture*

The value of articles partially manufactured is the value they would have when completed, less the cost of completing them.<sup>49</sup>

(j) Interest should be allowed as damages whenever it represents a loss proximately caused by defendant's wrong.<sup>50</sup>

## WRONG AND DAMAGE

### 3. Whenever a legal right is violated, and only then, damages may be recovered.

*"Damnum Absque Injuria—Injuria sine Damno"*

The term "damnum absque injuria" is applied to cases where a person suffers actual damage, but not in a sense recognized by the law as constituting an injury entitling him to a cause of action for relief.<sup>51</sup>

Harrington, 6 Johns. (N. Y.) 290, 5 Am. Dec. 229; from demand, 2 Scrib. Dower (2d Ed.) 714.

In New York, by statute, damages against the devisee or any person except the heir run from demand. *Roessle v. Roessle*, 163 App. Div. 344, 148 N. Y. Supp. 659.

<sup>46</sup> *Brown v. Calumet River Railway Co.*, 125 Ill. 600, 18 N. E. 283; *Sloan v. Baird*, 12 App. Div. 483, 42 N. Y. Supp. 38.

<sup>47</sup> *Graham v. Maitland*, 1 Sweeney (N. Y.) 149. But see *Parmenter v. Fitzpatrick*, 135 N. Y. 190, 31 N. E. 1032.

<sup>48</sup> *Bullard v. Stone*, 67 Cal. 477, 8 Pac. 17; *Furlong v. Polleys*, 30 Me. 491, 50 Am. Dec. 635; *Rice v. Manley*, 66 N. Y. 82, 23 Am. Rep. 30; *Wemple v. Stewart*, 22 Barb. (N. Y.) 154; *Grand Tower Min. Mfg. & Transp. Co. v. Phillips*, 23 Wall. 471, 23 L. Ed. 71.

<sup>49</sup> *Emmons v. Westfield Bank*, 97 Mass. 230.

<sup>50</sup> For a discussion of this subject, and a reference to the authorities, see *Interest and Usury*.

<sup>51</sup> *Hague v. Wheeler*, 157 Pa. 324, 27 Atl. 714, 22 L. R. A. 141, 37 Am. St. Rep. 736; *Talbot v. New York & H. R. Co.*, 151 N. Y. 162, 45 N. E. 382; *Phelps v. Nowlen*, 72 N. Y. 39, 28 Am. Rep. 93.

The term "*injuria sine damno*" is applied to cases where an injury, in a legal sense, is suffered, but where there is in fact no actual damage. Here nominal damages, and nothing more, may be recovered.<sup>52</sup>

Not every damage in fact is damage in law. To sustain an action for damages, the violation of a legal right must be shown.<sup>53</sup>

For every violation of a legal right, damages may be recovered.<sup>54</sup>

## PROXIMATE AND REMOTE CONSEQUENCES IN GENERAL

4. For purposes of liability, the consequences of wrongful conduct may be divided into—
  - (a) Proximate consequences, and
  - (b) Remote consequences.
5. Compensation may be recovered only for proximate losses resulting from wrongful conduct, and never for any losses which are remote.

Though compensation is the theory and aim of the law in awarding damages, every consequence of a wrong is not an element in the calculation of what is legal compensation. A person wronged can recover compensation only for the proximate consequences of the wrong. To hold one liable for all the consequences of a wrongful act "would set society on edge, and fill the courts with useless and injurious litigation."<sup>55</sup>

<sup>52</sup> *Fullam v. Stearns*, 30 Vt. 443; *Mayne, Dam.* § 6; *Paul v. Slason*, 22 Vt. 231, 54 Am. Dec. 75; *Little v. Stanback*, 63 N. C. 285; *Francis v. Schoellkopf*, 53 N. Y. 152.

<sup>53</sup> *Webb v. Portland Mfg. Co.*, 3 Sumn. 189, Fed. Cas. No. 17,322; and *Mechem, Cas. Dam.* 3. "A legal right must be invaded in order that an action of tort may be maintained. The mere fact that a complainant may have suffered a damage of the kind which the law recognizes is not enough. There must also be a violation of a duty recognized by law. In the language of the civil law, mere damage is not enough; there must also be *injuria*." *Jag. Torts*, 87; *Jessell, M. R.*, in *Day v. Brownrigg*, 10 Ch. Div. 294, 304. See, also, *Backhouse v. Bonomi*, 9 H. L. Cas. 503; *Salvin v. Coal Co.*, 9 Ch. App. 705; *Rogers v. Dutt*, 13 Moore, P. C. 209; *Rich v. New York Cent. & H. R. Co.*, 87 N. Y. 382; *Talbot v. New York & H. R. Co.*, 151 N. Y. 162, 45 N. E. 382; *Lord Kenyon, C. J.*, in *Pasley v. Freeman*, 3 Term R. 51, 63.

<sup>54</sup> *Webb v. Portland Mfg. Co.*, 3 Sumn. 189, Fed. Cas. No. 17,322; and *Mechem, Cas. Dam.* 3.

<sup>55</sup> *Fleming v. Beck*, 48 Pa. 309, 313; *Squire v. Western Union Telegraph Co.*, 98 Mass. 232, 93 Am. Dec. 157; *Cutting v. Grand Trunk Ry. Co.*, 13 Allen (Mass.) 381; *Fox v. Harding*, 7 Cush. (Mass.) 516; *Le Peintur v. Railway Co.*, 2 Law T. (N. S.) 170; *Jordan v. Patterson*, 67 Conn. 480, 35 Atl. 521.

The distinction of proximate from remote consequences is necessary—First, to ascertain whether there is any liability at all; and, second, if a wrong is established for which the defendant is liable, to fix the limit of liability or measure of damages.<sup>56</sup>

## DIRECT AND CONSEQUENTIAL LOSSES

6. For the purpose of determining what consequences are proximate and what remote, the losses caused by a wrong may be divided into—
  - (a) Direct, and
  - (b) Consequential losses.
7. Direct losses are such losses as proceed immediately from wrongful conduct, without the intervention of any intermediate cause.<sup>57</sup>
8. Direct losses are necessarily proximate, and compensation therefor is always recoverable.

### *Direct Losses*

A tort-feasor is liable for all injuries resulting directly from his wrongful act, whether they could or could not have been foreseen by him.<sup>58</sup>

Direct consequences are necessarily proximate. One is conclusively presumed to intend the direct consequence of one's acts. Thus, it was held in a civil action for assault, where defendant had intentionally kicked plaintiff on the leg during school hours, though he did not intend to injure him, that, the act being unlawful, defendant was lia-

<sup>56</sup> Pol. Torts, 27. "The question as to what is the direct or proximate cause of an injury is ordinarily not one of science or legal knowledge, but of fact, for a jury to determine in view of the accompanying circumstances." *Schumaker v. St. Paul & D. R. Co.*, 46 Minn. 39, 48 N. W. 559, 12 L. R. A. 257; *Moulton v. Inhabitants of Sanford*, 51 Me. 127, 134. See, also, *Dole v. New England Mut. Marine Ins. Co.*, 2 Cliff. 394, Fed. Cas. No. 3,966; *Baltimore & P. R. Co. v. Reaney*, 42 Md. 117; *Sutton v. Town of Wauwatosa*, 29 Wis. 21, 9 Am. Rep. 534. But see *Jeffersonville, M. & I. R. Co. v. Riley*, 39 Ind. 568; *Gates v. Burlington, C. R. & N. R. Co.*, 39 Iowa, 45.

"The test of remoteness is still to be found." Hale, *Dam.* (2d Ed.) p. 43.

<sup>57</sup> *Schumaker v. St. Paul & D. R. Co.*, 46 Minn. 39, 48 N. W. 559, 12 L. R. A. 257.

<sup>58</sup> *Cogdell v. Yett*, 1 Cold. (Tenn.) 230; *Tally v. Ayres*, 3 Sneed (Tenn.) 677; *Bowas v. Pioneer Tow Line*, 2 Sawy. 21, Fed. Cas. No. 1,713; *Perley v. Eastern R. Co.*, 98 Mass. 414, 96 Am. Dec. 645; *Brown v. Chicago, M. & St. P. R. Co.*, 54 Wis. 342, 11 N. W. 356, 911, 41 Am. Rep. 41; *Sloan v. Edwards*, 61 Md. 89; *Eten v. Luyster*, 60 N. Y. 252. Cf. *Allen v. McConihe*, 124 N. Y. 347, 26 N. E. 812.



ble for the injury which in fact resulted, though it could not have been foreseen.<sup>59</sup>

So, also, a sleeping-car company is liable for a miscarriage caused by the wrongful expulsion of a married woman from a berth, though its servants were ignorant of her delicate condition.<sup>60</sup>

In actions of contract the rule in respect to direct losses is the same.<sup>61</sup>

The rule of natural and probable consequences is a vague one; but, as Sir Frederick Pollock has said,<sup>62</sup> if English law seems vague on these questions it is because it has grappled more closely with the inherent vagueness of facts than any other system.

But the strong inclination of the courts to administer legal redress

<sup>59</sup> *Vosburg v. Putney*, 80 Wis. 523, 50 N. W. 403, 14 L. R. A. 226, 27 Am. St. Rep. 47.

<sup>60</sup> *Mann Boudoir-Car Co. v. Dupre*, 4 C. C. A. 540, 54 Fed. 646, 21 L. R. A. 289. Contra: *Pullman Palace-Car Co. v. Barker*, 4 Colo. 344, 34 Am. Rep. 89, a case much criticized, and opposed to all the other authorities. See, also, *Campbell v. Pullman Palace-Car Co. (C. C.)* 42 Fed. 484; *Brown v. Chicago, M. & St. P. Ry. Co.*, 54 Wis. 342, 11 N. W. 356, 911, 41 Am. Rep. 41; *Terre Haute & I. R. Co. v. Buck*, 96 Ind. 346, 49 Am. Rep. 168; *Lapline v. Morgan's L. & T. R. & Steamship Co.*, 40 La. Ann. 661, 4 South. 875, 1 L. R. A. 378; *Baltimore & L. T. Co. v. Cassell*, 66 Md. 419, 7 Atl. 805, 59 Am. Rep. 175; *Elliott v. Van Buren*, 33 Mich. 49, 20 Am. Rep. 668; *Jewell v. Grand Trunk Ry. Co.*, 55 N. H. 84; *Stewart v. City of Ripon*, 38 Wis. 584; *Coleman v. New York & N. H. R. Co.*, 106 Mass. 160; *Tice v. Munn*, 94 N. Y. 621; *Brown v. Chicago, M. & St. P. Ry. Co.*, 54 Wis. 342, 11 N. W. 356, 911, 41 Am. Rep. 41; *Beauchamp v. Saginaw Mining Co.*, 50 Mich. 163, 15 N. W. 65, 45 Am. Rep. 30. See, also, cases collected in *Clark v. Chambers*, 3 Q. B. Div. 327, 47 Law J. Q. B. 427; *Crane Elevator Co. v. Lippert*, 11 C. C. A. 521, 63 Fed. 942. "Where a disease caused by the injury supervenes, as well as where the disease exists at the time, and is aggravated by it, the plaintiff is entitled to full compensatory damages." *Louisville, N. A. & C. Ry. Co. v. Snyder*, 117 Ind. 435, 20 N. E. 284, 3 L. R. A. 434, 10 Am. St. Rep. 60; *Tice v. Munn*, 94 N. Y. 621.

<sup>61</sup> *Hadley v. Baxendale*, 9 Exch. 341; *Burrell v. New York & S. Solar Salt Co.*, 14 Mich. 34; *Brown v. Foster*, 51 Pa. 165; *Collard v. Railroad Co.*, 7 Hurl. & N. 79; *Williams v. Vanderbilt*, 28 N. Y. 217, 84 Am. Dec. 333; *Smith v. St. Paul, M. & M. Ry. Co.*, 30 Minn. 169, 14 N. W. 797; *Rhodes v. Baird*, 16 Ohio St. 581; *Brayton v. Chase*, 3 Wis. 456; *Bridges v. Stickney*, 38 Me. 361; *Paducah Lumber Co. v. Paducah Water Supply Co.*, 89 Ky. 340, 12 S. W. 554, and 13 S. W. 249, 7 L. R. A. 77, 25 Am. St. Rep. 536; *Louisville, N. A. & C. Ry. Co. v. Sumner*, 106 Ind. 55, 5 N. E. 404, 55 Am. Rep. 719; *Houser v. Pearce*, 13 Kan. 104. See *Prosser v. Jones*, 41 Iowa, 674; *McHose v. Fulmer*, 73 Pa. 365; *Wilkinson v. Davies*, 146 N. Y. 25, 40 N. E. 501; *Collins v. Stephens*, 58 Ala. 543; *Cohn v. Norton*, 57 Conn. 480, 492, 18 Atl. 595, 5 L. R. A. 572; *Kenrig v. Eggleston (1648)* Aleyn, 93; *Little v. Boston & M. R. Co.*, 66 Me. 239. See, also, *Mather v. American Express Co.*, 138 Mass. 55, 52 Am. Rep. 258; *Starbird v. Barrows*, 62 N. Y. 615. See *Hale, Dam. (2d Ed.)* p. 47.

<sup>62</sup> *Pol. Torts*, p. 33.

upon fixed and certain rules has sometimes led to the adoption of such rules in cases to which they could not be consistently or justly applied. Hence there is, perhaps, no branch of the law upon which there is a greater conflict of judicial decisions, and none in which so many merely arbitrary rules have been adopted.<sup>63</sup>

### SAME—CONSEQUENTIAL LOSSES

9. Consequential losses are the indirect losses caused by a wrong, but to which some intermediate cause has contributed.

10. Consequential losses may be either—

- (a) Proximate, or
- (b) Remote.

11. PROXIMATE AND REMOTE CONSEQUENTIAL LOSSES—Consequential losses are proximate when the natural and probable effect of the wrongful conduct under the circumstances is to set in operation the intervening cause from which the loss directly results. When such is not the natural and probable effect of the wrongful conduct, the losses are remote.

#### *Consequential Losses in General*

"A loss which is the immediate result of a wrong is called a 'direct loss'; one that is an indirect result of the wrong is called a 'consequential loss.'" <sup>64</sup>

For example, where a fence is destroyed, loss of the fence is the direct result. Loss of the crops by reason of trespassing cattle entering at the gap is indirect or consequential. Consequential losses differ from direct losses in this: That some intermediate cause has contributed to the injury. Whether or not compensation can be recovered for such losses will depend on the nature of the intervening cause. Proximate consequences, therefore, are simply those that are natural and probable.<sup>65</sup>

Whether or not a given result is natural and probable is for the jury,<sup>66</sup> unless the case is such that different inferences may not rea-

<sup>63</sup> Allison v. Chandler, 11 Mich. 542; Mechem, Cas. Dam. 99.

<sup>64</sup> Sedg. Dam. § 111.

<sup>65</sup> Covert v. Cranford, 141 N. Y. 521, 36 N. E. 597, 38 Am. St. Rep. 826.

<sup>66</sup> Haverly v. State Line & S. R. Co., 135 Pa. 50, 19 Atl. 1013, 20 Am. St. Rep. 848. In an action of contract, Blackburn, J., said: "I do not think that the question of remoteness ought ever to be left to a jury. That would be, in effect, to say that there shall be no such rule as to damages being too remote." Hobbs v. London Railroad Co., L. R. 10 Q. B. 111.

sonably be drawn.<sup>67</sup> But there is a manifest tendency on the part of the courts to withhold such questions from the consideration of the jury.<sup>68</sup>

Where plaintiff was induced by false representations to put money in a speculation, and afterwards put in more money, the loss of the latter money was held a proximate consequence of the fraud.<sup>69</sup>

Injury to plaintiff's mill and machinery, caused by a boiler explosion, is a proximate consequence of defects in the boiler.<sup>70</sup>

Where defendant abducted plaintiff's slaves, leaving no one to care for the plantation, it was held that compensation could be recovered for corn destroyed by cattle of the neighbors, and for wood swept away by a flood.<sup>71</sup>

A loss through deprivation of means of protection is proximate.<sup>72</sup>

A defect in a fence is a proximate cause of a trespass by cattle and injury to crops.<sup>73</sup>

It is natural and probable that a trespassing horse will kick other horses on the premises.<sup>74</sup>

Where plaintiff's horses escaped through the defect, and were killed by the falling of a haystack on defendant's premises, the loss was held not too remote.<sup>75</sup>

Where cattle escaped, and ate branches of a yew tree, and were thereby poisoned, the loss is the proximate result of the defect.<sup>76</sup>

Where defendant's wrong obliges plaintiff to raise money, a loss through a forced sale of property is too remote to be compensated.<sup>77</sup>

<sup>67</sup> *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256; *Ill. Cent. R. Co. v. Siler*, 229 Ill. 390, 82 N. E. 362, 15 L. R. A. (N. S.) 819, 11 Ann. Cas. 368; *Beiser v. Cincinnati, N. O. & T. P. R. Co.*, 152 Ky. 522, 153 S. W. 742, 43 L. R. A. (N. S.) 1050; *Kelly v. Lembeck Betz Eagle Brewing Co.*, 86 N. J. Law, 471, 92 Atl. 282.

<sup>68</sup> *Hobbs v. London R. Co.*, *supra*; *Read v. Nicholls*, 118 N. Y. 224, 23 N. E. 468, 7 L. R. A. 130; *Cuff v. Newark, etc., R. Co.*, 35 N. J. Law, 17; *Stone v. Boston & A. R. Co.*, 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 794.

<sup>69</sup> *Crater v. Binninger*, 33 N. J. Law, 513, 97 Am. Dec. 737.

<sup>70</sup> *Page v. Ford*, 12 Ind. 46; *Erie City Iron Works v. Barber*, 106 Pa. 125, 51 Am. Rep. 508.

<sup>71</sup> *McAfee v. Crofford*, 13 How. 447, 14 L. Ed. 217.

<sup>72</sup> *Derry v. Flitner*, 118 Mass. 131; *The George and Richard*, L. R. 3 Adm. & Ecc. 466; *Wilson v. Newport Dock Co.*, L. R. 1 Exch. 177; *Borradaile v. Brunton*, 8 Taunt. 535, 2 Moore, 582. But see *Hadley v. Baxendale*, 9 Exch. 341, 347.

<sup>73</sup> *Scott v. Kenton*, 81 Ill. 96.

<sup>74</sup> *Lee v. Riley*, 34 Law J. C. P. 212; *Lyons v. Merrick*, 105 Mass. 71.

<sup>75</sup> *Powell v. Salisbury*, 2 Younge & J. 391.

<sup>76</sup> *Lawrence v. Jenkins*, L. R. 8 Q. B. 274.

<sup>77</sup> See *Deyo v. Waggoner*, 19 Johns. (N. Y.) 241; *Donnell v. Jones*, 13 Ala. 490, 48 Am. Dec. 59; *Cochrane v. Quackenbush*, 29 Minn. 376, 13 N. W. 154;

Selling animals with an infectious disease is the proximate cause of its communication to other animals of the purchaser.<sup>78</sup>

Loss of business caused by the deprivation of machinery or of business premises is usually considered proximate.<sup>79</sup>

Loss of goods by sudden flood is not a proximate consequence of a negligent delay by a carrier.<sup>80</sup>

Where a defect in the street causes a traveler to be thrown out of his carriage, and exposed to the cold and rain, the city is liable for a serious disease thereby contracted.<sup>81</sup>

In all cases, it is, of course, prerequisite to any liability that defendant's act had an influence in causing the injury.<sup>82</sup>

There must be an immediate and natural relation between the act complained of and the injury, without the intervention of other independent causes, or the damages will be too remote.<sup>83</sup>

Where a human agency or the voluntary act of a person over whom defendant has no control intervenes after defendant's wrongful act, the consequences are usually remote;<sup>84</sup> but it depends upon whether the intervention of the second agent should have been anticipated and guarded against.

Where a village maintains a sidewalk at an unsafe height without guards, it is liable for injuries to one who is negligently pushed off by a third person;<sup>85</sup> but, where a town negligently leaves an excavation in the street, it is not liable to one who was willfully thrown into it by another.<sup>86</sup>

*Larios v. Gurety*, L. R. 5 P. C. 346; *Travis v. Duffau*, 20 Tex. 49; *Smith v. O'Donnell*, 8 Lea (Tenn.) 468.

<sup>78</sup> *Wheeler v. Randall*, 48 Ill. 182; *Sherrod v. Langdon*, 21 Iowa, 518.

<sup>79</sup> *Waters v. Towers*, 8 Exch. 401; *New York & C. Min. Syndicate & Co. v. Fraser*, 130 U. S. 611, 9 Sup. Ct. 665, 32 L. Ed. 1031. But see *Vedder v. Hildreth*, 2 Wis. 427, and *Ruthven Woolen Mfg. Co. v. Great Western R. Co.*, 18 U. C. C. P. 316; *Nelson Theater Co. v. Nelson*, 216 Mass. 30, 102 N. E. 926.

<sup>80</sup> *Denny v. New York Cent. R. Co.*, 13 Gray (Mass.) 481, 74 Am. Dec. 645; *Morrison v. Davis*, 20 Pa. 171, 57 Am. Dec. 695; *Memphis & C. R. Co. v. Reeves*, 10 Wall. 176, 19 L. Ed. 909. But see, contra, *Michaels v. New York Cent. R. Co.*, 30 N. Y. 564, 86 Am. Dec. 415; *Read v. Spaulding*, 30 N. Y. 630, 86 Am. Dec. 426.

<sup>81</sup> *Ehrgott v. Mayor, etc., of City of New York*, 96 N. Y. 264, 48 Am. Rep. 622.

<sup>82</sup> *Royston v. Illinois Cent. R. Co.*, 67 Miss. 376, 7 South. 320; *Ellis v. Cleveland*, 55 Vt. 358.

<sup>83</sup> *Rucker v. Athens Mfg. Co.*, 54 Ga. 84.

<sup>84</sup> *Burton v. Pinkerton*, L. R. 2 Exch. 340; *Stone v. Codman*, 15 Pick. (Mass.) 297; *Schmidt v. Mitchell*, 84 Ill. 195, 25 Am. Rep. 446.

<sup>85</sup> *Village of Carterville v. Cook*, 129 Ill. 152, 22 N. E. 14, 4 L. R. A. 721, 16 Am. St. Rep. 248.

<sup>86</sup> *Alexander v. Town of New Castle*, 115 Ind. 51, 17 N. E. 200.

Where the act of the third party is a natural and probable result of defendant's acts, the loss is not too remote.<sup>87</sup>

Loss of credit or custom involves the intervention of the will of strangers, and is often, therefore, too remote.<sup>88</sup>

But, where the wrongful conduct directly affects the credit or trade of plaintiff, the rule is otherwise;<sup>89</sup> and so in any case where the loss appears with reasonable certainty to be the proximate consequence of the defendant's wrong.<sup>90</sup>

A trespasser is liable for the injury caused by a crowd which he draws after him, if his act was of a nature to attract a destructive crowd.<sup>91</sup>

**12. CONSEQUENTIAL DAMAGES FOR TORTS**—Compensation may be recovered for all the consequential losses resulting from a tort which were natural and probable at the time the tort was committed.

**13. CONSEQUENTIAL DAMAGES FOR BREACH OF CONTRACT**—Compensation may be recovered only for such consequential losses resulting from a breach of contract as were natural and probable under the circumstances contemplated by the parties at the time the contract was made.

In determining what consequential losses shall be compensated, there is an important distinction between cases of contract and cases of tort.<sup>92</sup>

Liability for consequences is much more extended in the case of torts than of contracts. Compensation may be recovered for all the injurious consequences of a tort which result according to the usual order of events and general experience, and which, therefore, at the time the tort was committed, the wrongdoer may reasonably be presumed to have anticipated.<sup>93</sup>

<sup>87</sup> *Griggs v. Fleckenstein*, 14 Minn. 81 (Gil. 62), 100 Am. Dec. 199.

<sup>88</sup> *Lowenstein v. Monroe*, 55 Iowa, 82, 7 N. W. 406; *Weeks v. Prescott*, 53 Vt. 57. See *Alexander v. Jacoby*, 23 Ohio St. 358. Contra: *MacVeagh v. Bailey*, 29 Ill. App. 606.

<sup>89</sup> *Swain v. Schieffelin*, 134 N. Y. 471, 31 N. E. 1025, 18 L. R. A. 385; *Boyd v. Fitt*, 14 Ir. C. L. 43.

<sup>90</sup> *Sutherland*, Dam. (4th Ed.) § 70; *Nelson Theater Co. v. Nelson*, 216 Mass. 30, 102 N. E. 926; *Wakeman v. Wheeler & Wilson Mfg. Co.*, 101 N. Y. 205, 4 N. E. 264, 54 Am. Rep. 676.

<sup>91</sup> *Fairbanks v. Kerr*, 70 Pa. 86, 10 Am. Rep. 664; *Guille v. Swan*, 19 Johns. (N. Y.) 381, 10 Am. Dec. 234.

<sup>92</sup> *Suth. Dam.* § 45.

<sup>93</sup> *Hoadley v. Northern Transportation Co.*, 115 Mass. 304, 15 Am. Rep. 106; *Flori v. City of St. Louis*, 69 Mo. 341, 33 Am. Rep. 504; *Hughes v. McDonough*, 43 N. J. Law, 459, 39 Am. Rep. 603.

But, for breach of contract, compensation may be recovered only for such consequential losses as are natural and probable under the circumstances contemplated by the parties at the time the contract was made; and it is wholly immaterial what consequences are natural and probable, or even actually contemplated at the time of the breach.<sup>94</sup>

### *Consequential Damages for Torts*

Where, at the time a tort was committed, it might have been reasonably expected to set in operation the intermediate cause of an injury, or where it exposes plaintiff to the risk of injury from some fairly obvious danger, which ultimately results in injury, the loss is a natural and probable one, and may be compensated.<sup>95</sup>

### *Consequential Damages for Breach of Contract*

For anything amounting to a direct breach of contract, whether foreseen or unforeseen, the party responsible therefor is liable, because he has contracted that the other party shall receive that very thing; but he is not liable for indirect or consequential losses resulting from the breach, unless they are such as the parties may reasonably be presumed to have contemplated at the time the contract was made.<sup>96</sup>

In *Hadley v. Baxendale*<sup>97</sup> an attempt was made to settle this branch of the law, and a rule was laid down to govern the award of damages for breach of contract, that has been generally accepted both in England and America. The court said: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect to such breach of contract should be such as may fairly and reasonably be considered either arising nat-

<sup>94</sup> *Suth. Dam.* § 45; *Anson, Cont.* 310; *Hadley v. Baxendale*, 9 *Exch.* 341; *Candee v. Western Union Telegraph Co.*, 34 *Wis.* 479, 17 *Am. Rep.* 452; *Pacific Exp. Co. v. Darnell*, 62 *Tex.* 639; *Thomas, B. & W. Mfg. Co. v. Wabash, St. L. & P. Ry. Co.*, 62 *Wis.* 642, 22 *N. W.* 827, 51 *Am. Rep.* 725; *Smith v. Osborn*, 143 *Mass.* 185, 9 *N. E.* 558; *Packard v. Slack*, 32 *Vt.* 9; *Smith v. Green*, 1 *C. P. Div.* 92; *Riech v. Bolch*, 68 *Iowa*, 526, 27 *N. W.* 507; *Jones v. Gilmore*, 91 *Pa.* 310.

<sup>95</sup> *Suth. Dam.* § 28; *Bowas v. Pioneer Tow Line*, 2 *Sawy.* 21, *Fed. Cas. No.* 1,713; *Whart. Neg.* §§ 77, 78; *Higgins v. Dewey*, 107 *Mass.* 494, 9 *Am. Rep.* 63; *Stevens v. Dudley*, 56 *Vt.* 168; *Evans v. St. Louis, I. M. & S. R. Co.*, 11 *Mo. App.* 463; *Ehrgott v. Mayor, etc., of City of New York*, 96 *N. Y.* 281, 48 *Am. Rep.* 622; *Baltimore City Pass. Ry. Co. v. Kemp*, 61 *Md.* 74. See *Brown v. Chicago, M. & St. P. R. Co.*, 54 *Wis.* 342, 11 *N. W.* 356, 911, 41 *Am. Rep.* 41.

<sup>96</sup> *Allison v. Chandler*, 11 *Mich.* 542; *Mech. Cas. Dam.* 99; *Rochester Lantern Co. v. Stiles & Parker Press Co.*, 135 *N. Y.* 217, 31 *N. E.* 1018; *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 *U. S.* 540, 23 *Sup. Ct.* 754, 47 *L. Ed.* 1171; *Gourley v. American Hardwood Lumber Co.*, 185 *Mo. App.* 360, 170 *S. W.* 339; *Morton v. Witte*, 147 *App. Div.* 94, 131 *N. Y. Supp.* 777; *Skirm v. Hilliker*, 66 *N. J. Law*, 410, 49 *Atl.* 679.

<sup>97</sup> 9 *Exch.* 341, 23 *Law J. Exch.* 179, 18 *Jur.* 358, 26 *Eng. Law & Eq.* 398.

urally—i. e. according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.”

Three rules may be deduced from *Hadley v. Baxendale*: First, that damages which may fairly and reasonably be considered as naturally arising from a breach of contract, according to the usual course of things, are always recoverable;<sup>98</sup> secondly, that damages which would not arise in the usual course of things from a breach of contract, but which do arise from circumstances peculiar to the special case, are not recoverable, unless the special circumstances are known to the person who has broken the contract;<sup>99</sup> thirdly, that where the special circumstances are known or have been communicated to the person who breaks the contract, and where the damage complained of flows naturally from the breach of contract under those special circumstances, then such special damage must be supposed to have been contemplated by the parties to the contract, and is recoverable.<sup>1</sup>

A further rule is implied, viz. that damage which cannot be considered as fairly and naturally arising from breach of contract under any given circumstances is not recoverable, whether those circumstances were or were not known to the person who is being charged.<sup>2</sup>

In *Hadley v. Baxendale* a carrier delayed negligently the carrying of a mill shaft; and the question was whether the mill owner could recover damages for the consequent stoppage of his mill. It was held that he could not, because it was not distinctly brought to the notice of the carrier when the contract was made that the mill could not be

<sup>98</sup> *Sedg. Meas. Dam.* § 148; *Peak v. Frost*, 162 Mass. 298, 38 N. E. 518. See, also, *Little v. Boston & M. R. Co.*, 66 Me. 239; *Collard v. Railroad Co.*, 7 Hurl. & N. 79; *Gee v. Railroad Co.*, 6 Hurl. & N. 211; *Wilson v. Railroad Co.*, 9 C. B. (N. S.) 632; *Wilson v. Dock Co.*, L. R. 1 Exch. 177; *Baldwin v. United States Telegraph Co.*, 45 N. Y. 744, 750, 6 Am. Rep. 165; *Ward v. New York Cent. R. Co.*, 47 N. Y. 29, 32, 7 Am. Rep. 405; *Shepard v. Milwaukee Gaslight Co.*, 15 Wis. 318, 82 Am. Dec. 679; *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 487; *Cory v. Iron-Works Co.*, L. R. 3 Q. B. 188.

<sup>99</sup> *Gee v. Railroad Co.*, 6 Hurl. & N. 211; *Howard v. Stillwell & B. Mfg. Co.*, 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147; *Case v. Stevens*, 137 Mass. 551; *Mather v. American Express Co.*, 138 Mass. 55, 52 Am. Rep. 258; *Fox v. Railroad Co.*, 148 Mass. 220, 19 N. E. 222, 1 L. R. A. 702; *Benziger v. Miller*, 50 Ala. 206; *Keith's Ex'r v. Hinkston*, 9 Bush (Ky.) 283; *Thomas, B. & W. Mfg. Co. v. Wabash, St. L. & P. Ry. Co.*, 62 Wis. 642, 22 N. W. 827, 51 Am. Rep. 725.

<sup>1</sup> *Borries v. Hutchinson*, 18 C. B. (N. S.) 463; *Messmore v. New York Shot & Lead Co.*, 40 N. Y. 422; *Illinois Cent. R. Co. v. Cobb*, 64 Ill. 128; *Hammond v. Bussey*, 20 Q. B. Div. 79; *Smith v. Flanders*, 129 Mass. 322.

<sup>2</sup> *Mayne, Dam.* 10; *Hamilton v. Western N. C. R. Co.*, 96 N. C. 398, 3 S. E. 164; *Deming v. Grand Trunk R. Co.*, 48 N. H. 455, 2 Am. Rep. 267; *Rochester Lantern Co. v. Stiles & Parker Press Co.*, 135 N. Y. 217, 31 N. E. 1013. See *Hexter v. Knox*, 63 N. Y. 561.

operated until the shaft arrived. Although the rule therein enunciated is commonly stated to be confined to actions of contract, it would seem to be immaterial in such a case whether the shaft was carried for hire or gratuitously or whether the action was brought in contract or in tort.<sup>3</sup>

### THE REQUIRED CERTAINTY OF DAMAGES

14. Losses must be certain in amount, and certain in respect to the cause from which they proceed, or damages therefor cannot be recovered. The burden of proving both these facts is on the plaintiff.

In an action for damages, the plaintiff must prove, as a part of his case, both the amount and the cause of his loss. Absolute certainty is not required, but both the cause and the probable amount of the loss must be shown with reasonable certainty.<sup>4</sup>

Reasonable certainty means reasonable probability.<sup>5</sup>

It has been held that where the damage is certain, and only the amount is uncertain, there can seldom be good reason for denying a recovery.<sup>6</sup>

### SAME—PROFITS OR GAINS PREVENTED

15. Compensation may be recovered for profits lost when the loss is a proximate and certain result of the tort or breach of contract.

“The broad general rule in such cases is that the party injured is entitled to recover all his damages, including gains prevented as well

<sup>3</sup> The matter is quite fully considered, with many citations, in Sutherland, Dam. (4th Ed.) § 45 et seq.

<sup>4</sup> East Tennessee, V. & G. R. Co. v. Staub, 7 Lea (Tenn.) 397; Wolcott v. Mount, 36 N. J. Law, 262, 271, 13 Am. Rep. 438; Allison v. Chandler, 11 Mich. 542, 555; Satchwell v. Williams, 40 Conn. 371; Suth. Dam. § 53; Rochester Lantern Co. v. Stiles & Parker Press Co., 135 N. Y. 217, 31 N. E. 1018; Griffin v. Colver, 16 N. Y. 494, 69 Am. Dec. 718; Leeds v. Metropolitan Gaslight Co., 90 N. Y. 26; Duke v. Missouri Pac. Ry. Co., 99 Mo. 347, 351, 12 S. W. 636.

<sup>5</sup> Griswold v. New York Cent. & H. R. Co., 115 N. Y. 61, 21 N. E. 726, 12 Am. St. Rep. 775; United States Trust Co. of New York v. O'Brien, 143 N. Y. 284, 38 N. E. 266.

<sup>6</sup> Wakeman v. Wheeler & W. Mfg. Co., 101 N. Y. 205, 4 N. E. 264, 54 Am. Rep. 676.

It may be questioned whether this oft-stated rule means anything more than that damages, like every element of the plaintiff's case, must be proved. The matter is extensively treated in Sutherland, Dam. (4th Ed.) § 53 et seq.



as losses sustained; and this rule is subject to but two conditions: The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract,—that is, must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed.”<sup>7</sup>

Where the losses claimed are contingent, speculative, or merely possible, they cannot be compensated.<sup>8</sup>

Anticipated profits from a competition or speculation are too uncertain to be compensated.<sup>9</sup>

Where plaintiff is engaged in a mercantile business, compensation for a personal injury is limited to the value of his loss of time. Loss of profits of the business through the injury to the good will is not a natural consequence.<sup>10</sup>

The usual and ordinary profits of an established business or profession are reasonably certain, and may be recovered in an action for interruption of the business, in the absence of anything showing that they would not have been realized.<sup>11</sup>

<sup>7</sup> *Witherbee v. Meyer*, 155 N. Y. 446, 50 N. E. 58; *Griffin v. Colver*, 16 N. Y. 489, 491, 69 Am. Dec. 718; *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 487; *Wakeman v. Wheeler & W. Mfg. Co.*, 101 N. Y. 205, 4 N. E. 264. 54 Am. Rep. 676; *Bernstein v. Meech*, 130 N. Y. 354, 29 N. E. 255; *Thomson-Houston Electric Co. of New York v. Durant Land Imp. Co.*, 144 N. Y. 47, 39 N. E. 7; *Danforth v. Tennessee & C. R. Co.*, 99 Ala. 331, 13 South. 56; *Pennypacker v. Jones*, 106 Pa. 237. Cf. *Anson, Cont. (Am. Ed.)* 311, note; *Howard v. Stillwell & B. Mfg. Co.*, 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147.

<sup>8</sup> *Witherbee v. Meyer*, 155 N. Y. 446, 453, 50 N. E. 58; *De Costa v. Massachusetts Flat Water & Mining Co.*, 17 Cal. 613; *Todd v. Keene*, 167 Mass. 157, 45 N. E. 81; *Moss v. Tompkins*, 69 Hun, 288, 23 N. Y. Supp. 623; *Id.*, 144 N. Y. 659, 39 N. E. 858; *Bernstein v. Meech*, 130 N. Y. 354, 29 N. E. 255; *Fry v. Dubuque & S. W. Ry. Co.*, 45 Iowa, 416; *Lincoln v. Saratoga & S. R. Co.*, 23 Wend. (N. Y.) 425; *Staal v. Grand St. & N. R. Co.*, 107 N. Y. 625, 13 N. E. 624; *Chicago City Ry. Co. v. Henry*, 62 Ill. 142.

<sup>9</sup> *Watson v. Railroad Co.*, 15 Jur. 448; *Western Union Tel. Co. v. Crall*, 39 Kan. 580, 18 Pac. 719; *Mizner v. Frazier*, 40 Mich. 592, 29 Am. Rep. 562; *Western Union Tel. Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. 577, 31 L. Ed. 479. But see *Adams Exp. Co. v. Egbert*, 36 Pa. 360, 78 Am. Dec. 382.

<sup>10</sup> *Marks v. Long Island Railroad Co.*, 14 Daly (N. Y.) 61; *Bierbach v. Good-year Rubber Co.*, 54 Wis. 208, 11 N. W. 514, 41 Am. Rep. 19; *Masterton v. Village of Mt. Vernon*, 58 N. Y. 391. But see *Ehrgott v. Mayor, etc., of City of New York*, 96 N. Y. 275.

<sup>11</sup> *Dickinson v. Hart*, 142 N. Y. 183, 36 N. E. 801; *Snow v. Pulitzer*, 142 N. Y. 263, 36 N. E. 1059; *Allison v. Chandler*, 11 Mich. 542; *Peltz v. Eichele*, 62 Mo. 171; *Ehrgott v. Mayor, etc., of City of New York*, 96 N. Y. 275, 48 Am. Rep. 622; *French v. Connecticut River Lumber Co.*, 145 Mass. 261, 14 N. E. 113; *Hattiesburg Lumber Co. v. Herrick*, 212 Fed. 834, 129 C. C. A. 288; *Allied Silk Mfrs. v. Erstein*, 168 App. Div. 283, 153 N. Y. Supp. 976; *Nelson Theater Co. v. Nelson*, 216 Mass. 30, 102 N. E. 926 (moving picture theater).

Some businesses are of so uncertain a nature that their profits never become established, such as fishing.<sup>12</sup> Still damages have been allowed for the fish which a person would have caught at a certain time and place.<sup>13</sup>

Plaintiff cannot recover anticipated profits of a new business, in which he was wrongfully prevented from embarking.<sup>14</sup>

Damages for the loss of use of land or business premises are the rental value, and the same measure is to be applied in actions based on breach of contract to deliver machinery, or furnish water power for mills, etc., where no special circumstances exist rendering loss of expected profits a more appropriate measure;<sup>15</sup> but profits which would certainly have been realized but for defendant's fault, and which are not speculative and contingent, are recoverable.<sup>16</sup>

Compensation may be recovered for loss of earnings or income caused by personal injuries.<sup>17</sup>

For breach of a contract of partnership, plaintiff may recover such profits as he can prove with reasonable certainty. Evidence of past profits is admissible, but not conclusive.<sup>18</sup>

Where the partnership was terminable on notice, future profits cannot be recovered.<sup>19</sup>

<sup>12</sup> *Wright v. Mulvaney*, 78 Wis. 89, 46 N. W. 1045, 9 L. R. A. 807, 23 Am. St. Rep. 393.

<sup>13</sup> *Pacific Steam Whaling Co. v. Alaska Packers' Assn.*, 138 Cal. 632, 72 Pac. 161; *Smalling v. Jackson*, 133 App. Div. 382, 117 N. Y. Supp. 268; *The Seven Brothers* (D. C.) 170 Fed. 126.

<sup>14</sup> *Red v. City Council of Augusta*, 25 Ga. 386; *Greene v. Williams*, 45 Ill. 206; *Morey v. Metropolitan Gaslight Co.*, 38 N. Y. Super. Ct. 185; *Creamery Package Mfg. Co. v. Benton County Creamery Co.*, 120 Iowa, 584, 95 N. W. 188; *Whitehead v. Cape Henry Syndicate*, 111 Va. 193, 68 S. E. 263.

<sup>15</sup> *Witherbee v. Meyer*, 155 N. Y. 446, 50 N. E. 58; *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718; *City of Chicago v. Huenerbein*, 85 Ill. 594, 28 Am. Rep. 626; *Hexter v. Knox*, 63 N. Y. 561; *Townsend v. Nickerson Wharf Co.*, 117 Mass. 501; *Dodds v. Hakes*, 114 N. Y. 260, 21 N. E. 398. But see *Cargill v. Thompson*, 57 Minn. 548, 59 N. W. 638.

<sup>16</sup> *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718; *Sherman Center Town Co. v. Leonard*, 46 Kan. 354, 26 Pac. 717, 26 Am. St. Rep. 101; *Sutherland*, *Dam.* (4th Ed.) § 70. See cases in note 11, p. 473.

<sup>17</sup> *Moore's Adm'r v. Minerva*, 17 Tex. 20; *Wade v. Le Roy*, 20 How. 34, 15 L. Ed. 813; *Pierce v. Millay*, 44 Ill. 189; *Masterton v. Village of Mt. Vernon*, 58 N. Y. 391; *Sheehan v. Edgar*, 58 N. Y. 631; *Pennsylvania & O. Canal Co. v. Graham*, 63 Pa. 290, 3 Am. Rep. 549; *Houston & T. C. Ry. Co. v. Boehm*, 57 Tex. 152; *Gray v. Boston Elevated Ry. Co.*, 215 Mass. 143, 102 N. E. 71.

<sup>18</sup> *Bagley v. Smith*, 10 N. Y. 489, 61 Am. Dec. 756; *Gale v. Leckie*, 2 Starkie, 107; *Dart v. Laimbeer*, 107 N. Y. 664, 14 N. E. 291; *Dennis v. Maxfield*, 10 Allen (Mass.) 138; *Zimmerman v. Harding*, 227 U. S. 489, 33 Sup. Ct. 387, 57 L. Ed. 608.

<sup>19</sup> *Skinner v. Tinker*, 34 Barb. (N. Y.) 333; *Ball v. Britton*, 58 Tex. 57.

Profits of collateral transactions are usually too remote and uncertain to be recovered for breach of contract;<sup>20</sup> but, where the profit is the thing contracted for, it may be recovered.<sup>21</sup>

The average or usual value of the use of personal property is the measure of damages for the loss of its use.<sup>22</sup>

For the loss of personal property, the wholesale market value, and not the retail value, is the measure of damages.<sup>23</sup>

The labor of professional men has no fixed market value. What the injured person has earned in the past is evidence, though not conclusive, of what he might have earned.<sup>24</sup>

It is immaterial that plaintiff is not legally entitled to such earnings, if he was in the customary receipt of them.<sup>25</sup>

But loss of earnings in an illegal employment cannot be compensated.<sup>26</sup>

Where one is not engaged in business at the time of an injury, he may recover compensation for being prevented from engaging in business in the future.<sup>27</sup>

A dealer, having a contract right to exclusive county sales of another's goods, may, if the latter breaks the contract and makes sales by others, recover the profits he would have realized on those sales.<sup>28</sup>

<sup>20</sup> *Fox v. Harding*, 7 Cush. (Mass.) 516; *Mace v. Ramsey*, 74 N. C. 11; *Mitchell v. Cornell*, 44 N. Y. Super. Ct. 401; *Shaw v. Hoffman*, 25 Mich. 162; *Shoemaker v. Acker*, 116 Cal. 239, 48 Pac. 62.

<sup>21</sup> *Masterton v. Mayor, etc., of City of Brooklyn*, 7 Hill (N. Y.) 61, 42 Am. Dec. 38; *Lentz v. Choteau*, 42 Pa. 435; *Shoemaker v. Acker*, supra; *Hichhorn v. Bradley*, 117 Iowa, 130, 90 N. W. 592; *Anvil Mining Co. v. Humble*, 153 U. S. 540, 14 Sup. Ct. 876, 38 L. Ed. 814; *Wilkinson v. Dunbar*, 149 N. C. 20, 62 S. E. 748. See *Sutherland*, Dam. (4th Ed.) §§ 63, 64.

<sup>22</sup> *Benton v. Fay*, 64 Ill. 417; *Shelbyville Lateral Branch R. Co. v. Lewark*, 4 Ind. 471; *Johnson v. Inhabitants of Holyoke*, 105 Mass. 80; *Luce v. Hoisington*, 56 Vt. 436; *Whitson v. Gray*, 3 Head (Tenn.) 441.

<sup>23</sup> *Young v. Cureton*, 87 Ala. 727, 6 South. 352; *Wehle v. Haviland*, 69 N. Y. 448. But see *Alabama Iron Works v. Hurley*, 86 Ala. 217, 5 South. 418.

<sup>24</sup> *Pennsylvania R. Co. v. Dale*, 76 Pa. 47; *New Jersey Exp. Co. v. Nichols*, 33 N. J. Law, 434, 97 Am. Dec. 722; *Nash v. Sharpe*, 19 Hun (N. Y.) 365; *Walker v. Erie Ry. Co.*, 63 Barb. (N. Y.) 260; *Baker v. Manhattan Ry. Co.*, 54 N. Y. Super. Ct. 394; *Phillips v. Railroad Co.*, 5 C. P. Div. 280; *Metcalf v. Baker*, 57 N. Y. 662; *Collins v. Dodge*, 37 Minn. 503, 35 N. W. 368; *Masterton v. Village of Mt. Vernon*, 58 N. Y. 391; *Gray v. Boston Elevated R. Co.*, 215 Mass. 143, 102 N. E. 71.

<sup>25</sup> *Phillips v. Railroad Co.*, 5 C. P. Div. 280; *Holmes v. Halde*, 74 Me. 28, 43 Am. Rep. 567.

<sup>26</sup> *Jacques v. Bridgeport Horse R. Co.*, 41 Conn. 61, 19 Am. Rep. 483; *Kauffman v. Babcock*, 67 Tex. 241, 2 S. W. 878.

<sup>27</sup> *Fisher v. Jansen*, 128 Ill. 549, 21 N. E. 598.

<sup>28</sup> *Dr. Harter Medicine Co. v. Hopkins*, 83 Wis. 312, 53 N. W. 501; *Wakeman v. Wheeler & W. Mfg. Co.*, 101 N. Y. 205, 4 N. E. 264, 54 Am. Rep. 676.

Where a construction contract calls for payments in installments, the contractor may, upon failure to pay a given installment, rescind and recover for materials and services already supplied or rendered, or may proceed with the work and sue for the installment due; but he cannot refuse to proceed, and then recover prospective profits. To entitle him to such profits, it must appear that he is willing to proceed, and that the defendant has repudiated or abandoned the contract.<sup>29</sup>

*Prospective Gains from Property Totally Destroyed*

Anticipated profits or gains from the use of property which has been totally destroyed by defendant's wrong do not fall within the rule, and cannot be recovered. In such cases compensation is given for the whole value of the property destroyed, and thereupon, in legal contemplation, all plaintiff's title and interest in the property ceases.<sup>30</sup>

### ELEMENTS OF COMPENSATION

16. Damage in respect to anything in the enjoyment of which one is protected by law may be a subject for compensation.
17. Damage for which the law affords compensation may be divided into three classes:
  - (a) Pecuniary losses, direct and indirect;
  - (b) Physical pain and inconvenience;
  - (c) Mental suffering.

The law awards damages only for injuries to person, property, or reputation. An injury in any one of these respects may affect one in one or more of three ways. It may cause (1) pecuniary loss, direct or indirect; (2) physical pain and inconvenience; and (3) mental suffering. All three are proper elements of compensation to be considered in estimating damages.

<sup>29</sup> Wharton & Co. v. Winch, 140 N. Y. 287, 35 N. E. 589.

<sup>30</sup> Sedg. Meas. Dam. § 178; McKnight v. Ratcliff, 44 Pa. 156; Edwards v. Beebe, 48 Barb. (N. Y.) 106; Gossage v. Philadelphia B. & W. R. Co., 101 Md. 698, 61 Atl. 692; Erie City Iron Works v. Barber, 106 Pa. 125, 51 Am. Rep. 508.

## SAME—PECUNIARY LOSSES

18. Compensation for all pecuniary losses which are the proximate and certain result of the cause of action may be recovered, except—

**EXCEPTION**—Counsel fees incurred in litigation caused by the wrong are usually not recoverable.

Generally speaking, pecuniary losses are always an element in estimating the damages caused by a wrong.

### *Expenses of Litigation*

The expenses of litigation to obtain compensation for a wrong, though the natural and probable consequence of an injury, cannot usually be recovered as damages.<sup>31</sup>

In general, the law considers the taxed costs as the only damage which a party sustains by the defense of a suit against him, and these he recovers by the judgment in his favor.<sup>32</sup>

Where, however, prior litigation was a part of the wrong for which damages are presently claimed, the expenses of that litigation are, of course, an element of the damages.<sup>33</sup>

## SAME—PHYSICAL PAIN AND INCONVENIENCE

19. Compensation may always be recovered for physical pain which is the proximate and certain result of a wrong.
20. Inconvenience amounting to physical discomfort may be compensated.

Physical pain or inconvenience which is the proximate and certain result of a wrong is always an element of compensation.<sup>34</sup>

<sup>31</sup> **CONTRACTS**—Goodbar v. Lindsley, 51 Ark. 380, 11 S. W. 577, 14 Am. St. Rep. 54; Vorse v. Phillips, 37 Iowa, 428; Offutt v. Edwards, 9 Rob. (La.) 90.

**TORTS**—Flanders v. Tweed, 15 Wall. 450, 21 L. Ed. 203; Winstead v. Hulme, 32 Kan. 568, 4 Pac. 994; Kelly v. Rogers, 21 Minn. 146; Hicks v. Foster, 13 Barb. (N. Y.) 663; Bishop v. Hendrick, 82 Hun, 323, 31 N. Y. Supp. 502.

<sup>32</sup> Young v. Courtney, 13 La. Ann. 193.

<sup>33</sup> O'Hore v. Kelsey, 60 App. Div. 604, 70 N. Y. Supp. 14.

<sup>34</sup> Pierce v. Millay, 44 Ill. 189; McKinley v. Chicago & N. W. R. Co., 44 Iowa, 314, 24 Am. Rep. 748; Ross v. Leggett, 61 Mich. 445, 28 N. W. 695, 1 Am. St. Rep. 608; Stephens v. Hannibal & St. J. R. Co., 96 Mo. 207, 9 S. W. 589, 9 Am. St. Rep. 336; Pennsylvania & O. Canal Co. v. Graham, 63 Pa. 290, 3 Am. Rep. 549; Goodno v. City of Oshkosh, 28 Wis. 300; Hale, Dam. (2d Ed.) § 38; Sutherland, Dam. (4th Ed.) § 1242.

The amount of damages awarded is necessarily left to the sound discretion of the jury, for there is no arithmetical rule by which the equivalent of such injuries in money can be estimated. Damages cannot be recovered for inconvenience or annoyance,<sup>35</sup> unless it amounts to physical discomfort.<sup>36</sup>

"The injury must be physical, as distinguished from one purely imaginative. It must be something that produces real discomfort or annoyance, through the medium of the senses, not from delicacy of taste or refined fancy."<sup>37</sup>

### SAME—MENTAL SUFFERING

21. Mental suffering standing alone will not support an action where damages is the gist of the wrong.

22. Mental suffering which is the proximate and certain result of conduct actionable per se, whether a tort or breach of contract, may be compensated.

**EXCEPTION**—In many states compensation cannot be recovered for mental suffering resulting from a breach of contract.

#### *Mental Suffering as the Basis of a Cause of Action*

It has been doubted whether compensation can ever be recovered for mental suffering, as distinguished from physical suffering;<sup>38</sup> but there is now no dissent.<sup>39</sup>

It is true that where the negligent or wrongful act of one person unintentionally puts another in a position of peril, and thereby causes fear and apprehension in the mind of the latter, but no actual harm

<sup>35</sup> *Hamlin v. Railway Co.*, 1 Hurl. & N. 408; *D'Orval v. Hunt*, Dud. (S. C.) 180; *Connell v. Western Union Telegraph Co.*, 116 Mo. 34, 22 S. W. 345, 20 L. R. A. 172, 38 Am. St. Rep. 575; *Russell v. Western Union Telegraph Co.*, 3 Dak. 315, 19 N. W. 408; *Wilcox v. Richmond & D. R. Co.*, 3 C. C. A. 73, 52 Fed. 264, 17 L. R. A. 804; *Turner v. Gt. Northern Ry. Co.*, 15 Wash. 213, 46 Pac. 243, 55 Am. St. Rep. 883.

<sup>36</sup> *Chicago & A. R. Co. v. Flagg*, 43 Ill. 364, 92 Am. Dec. 133; *Emery v. City of Lowell*, 109 Mass. 197; *Ross v. Leggett*, 61 Mich. 445, 28 N. W. 695, 1 Am. St. Rep. 608. But see *Walsh v. Chicago, M. & St. P. Ry. Co.*, 42 Wis. 23, 24 Am. Rep. 376; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739.

<sup>37</sup> *Westcott v. Middleton*, 43 N. J. Eq. 478, 486, 11 Atl. 490; *Id.*, 44 N. J. Eq. 297, 18 Atl. 80. And see *Baltimore & O. R. Co. v. Carr*, 71 Md. 135, 17 Atl. 1052.

<sup>38</sup> See *Sedg. Meas. Dam.* § 44; 1 *Suth. Dam.* 78; *Wadsworth v. Western Union Telegraph Co.*, 86 Tenn. 721, 8 S. W. 574, 6 Am. St. Rep. 864.

<sup>39</sup> *Sutherland, Dam.* (4th Ed.) § 95.

results, there is no cause of action.<sup>40</sup> But it has been held in many cases that where mental suffering is intentionally and maliciously caused there may be a recovery, by analogy to the action of assault where the mental suffering is the only damage.<sup>41</sup>

Where, however, the fright or shock causes illness, nervous prostration, or any other physical injury, the original fault is the proximate cause of the injury; and compensation may be recovered, in some states, not for the fright, but for the results of it;<sup>42</sup> but there is much authority to the contrary.

Where the fear or anxiety, instead of causing the physical injury, accompanies it, as a concomitant or incident, the injury being proved, compensation may be had for the mental suffering. The physical injury supports the action.<sup>43</sup>

<sup>40</sup> *O'Flaherty v. Nassau Electric R. Co.*, 34 App. Div. 74, 54 N. Y. Supp. 96; *Canning v. Inhabitants of Williamstown*, 1 Cush. (Mass.) 451; *Atchison, T. & S. F. R. Co. v. McGinnis*, 46 Kan. 109, 26 Pac. 453; *Ft. Worth & D. C. Ry. Co. v. Burton* (Tex. App.) 15 S. W. 197; *Wyman v. Leavitt*, 71 Me. 227, 36 Am. Rep. 303; *Ewing v. Pittsburgh, C. & St. L. R. Co.*, 147 Pa. 40, 23 Atl. 340, 14 L. R. A. 666, 30 Am. St. Rep. 709. Contra: *Yoakum v. Kroeger* (Tex. Civ. App.) 27 S. W. 953; *Spade v. Lynn & B. R. Co.*, 168 Mass. 285, 47 N. E. 88, 38 L. R. A. 512, 60 Am. St. Rep. 393; *Ewing v. Pittsburgh, C. & St. L. Ry. Co.*, 147 Pa. 40, 23 Atl. 340, 14 L. R. A. 666, 30 Am. St. Rep. 709; *Mitchell v. Rochester R. Co.*, 151 N. Y. 107, 45 N. E. 354, 34 L. R. A. 781, 56 Am. St. Rep. 604; *Porter v. Delaware, L. & W. R. Co.*, 73 N. J. Law, 405, 63 Atl. 860.

But there are many cases contra. See *Hale, Dam.* (2d Ed.) p. 144; *Sutherland, Dam.* (4th Ed.) § 95.

<sup>41</sup> *Garrison v. Sun Printing & Publishing Ass'n*, 207 N. Y. 1, 100 N. E. 430, 45 L. R. A. (N. S.) 766, Ann. Cas. 1914C, 288; *Carter v. Oster*, 134 Mo. App. 146, 112 S. W. 995; *Moyer v. Gordon*, 113 Ind. 282, 14 N. E. 476.

<sup>42</sup> *Smith v. St. Paul, M. & M. Ry. Co.*, 30 Minn. 169, 14 N. W. 797; *Bell v. Railway Co.*, L. R. 26 Ir. 428, disapproving *Victorian Railways Com'rs v. Coultas*, 13 App. Cas. 222. Contra: *Mitchell v. Rochester Railway Co.*, 151 N. Y. 107, 45 N. E. 354, 34 L. R. A. 781, 56 Am. St. Rep. 604; *White v. Sander*, 168 Mass. 296, 47 N. E. 96. See, also, *Fitzpatrick v. Railway Co.*, 12 U. C. Q. B. 645; *Oliver v. Town of La Valle*, 36 Wis. 592; *Warren v. Boston & M. R. Co.*, 163 Mass. 484, 40 N. E. 895.

See, also, *Watson v. Dilts*, 116 Iowa, 249, 89 N. W. 1068, 57 L. R. A. 559, 93 Am. St. Rep. 239; *Watkins v. Kaolin Mfg. Co.*, 131 N. C. 536, 42 S. E. 983, 60 L. R. A. 617; *Green v. T. A. Schoemaker & Co.*, 111 Md. 69, 73 Atl. 688, 23 L. R. A. (N. S.) 667.

Contra: *Hutchinson v. Stern*, 115 App. Div. 791, 101 N. Y. Supp. 145; *Ewing v. Pittsburgh, C. & St. L. Ry. Co.*, 147 Pa. 40, 23 Atl. 340, 14 L. R. A. 666, 30 Am. St. Rep. 709; *Smith v. Postal Tel. Cable Co.*, 174 Mass. 576, 55 N. E. 380, 47 L. R. A. 323, 75 Am. St. Rep. 374; *Ward v. West Jersey & S. R. Co.*, 65 N. J. Law, 384, 47 Atl. 561.

<sup>43</sup> *O'Flaherty v. Nassau Electric R. Co.*, 34 App. Div. 74, 54 N. Y. Supp. 96; *Allen v. Texas & P. Ry. Co.* (Tex. Civ. App.) 27 S. W. 943; *Fell v. Northern Pac. R. Co.* (C. C.) 44 Fed. 248; *Cohn v. Ansonia*, 162 App. Div. 791, 148 N. Y.

And it is often difficult to fix the damages, even where injury in a legal sense results.<sup>44</sup>

But, where the law recognizes a right to compensation for an injury, such difficulty is never a ground for withholding all damages;<sup>45</sup> and the difficulty is solved by leaving the matter to the sound discretion of a jury.<sup>46</sup>

### *Mental Suffering in Actions of Tort*

Compensation for mental suffering which is the natural, proximate, and certain result of a tort may be recovered.<sup>47</sup>

Supp. 39; Megathlin v. Boston Elevated R. Co., 220 Mass. 558, 108 N. E. 362; Porter v. Delaware, L. & W. R. Co., 73 N. J. Law, 405, 63 Atl. 860.

<sup>44</sup> Wadsworth v. Western Union Telegraph Co., 86 Tenn. 721, 8 S. W. 574, 6 Am. St. Rep. 864.

<sup>45</sup> Id.

<sup>46</sup> Wadsworth v. Western Union Telegraph Co., 86 Tenn. 695, 8 S. W. 574, 6 Am. St. Rep. 864; Ballou v. Farnum, 11 Allen (Mass.) 77, 78.

<sup>47</sup> Personal Injury. Van De Venter v. Chicago City Ry. Co. (C. C.) 26 Fed. 32; Drinkwater v. Dinsmore, 16 Hun (N. Y.) 250; Ransom v. New York & E. R. Co., 15 N. Y. 415; Curtis v. Rochester & S. R. Co., 18 N. Y. 534, 75 Am. Dec. 258; Walker v. Erie Ry. Co., 63 Barb. (N. Y.) 260; Demann v. Eighth Ave. R. Co., 10 Misc. Rep. 191, 30 N. Y. Supp. 926; Wabash & W. Ry. Co. v. Morgan, 132 Ind. 430, 31 N. E. 661, and 32 N. E. 85; Fleming v. Town of Shenandoah, 71 Iowa, 456, 32 N. W. 456; Sidekum v. Wabash, St. L. & P. Ry. Co., 93 Mo. 400, 4 S. W. 701, 3 Am. St. Rep. 549. Assault and Battery. Gaither v. Blowers, 11 Md. 536; Morgan v. Curley, 142 Mass. 107, 7 N. E. 726; McIntyre v. Giblin, 131 U. S. 174. Append., 9 Sup. Ct. 698, note, 25 L. Ed. 572. Indecent Assault. Wolf v. Trinkle, 103 Ind. 355, 3 N. E. 110; Fay v. Swan, 44 Mich. 544, 7 N. W. 215; Ford v. Jones, 62 Barb. (N. Y.) 484. Injury to Child—Recovery by Parent. Durkee v. Central Pac. R. Co., 56 Cal. 388, 38 Am. Rep. 59. Civil Damage Laws. Black, Intox. Liq. § 309; Mulford v. Clewell, 21 Ohio St. 191. Ejection of Passenger by Carrier. Coppin v. Braithwaite, 8 Jur. 875; Gallena v. Hot Springs R. Co. (C. C.) 13 Fed. 116; Hoffman v. Northern Pac. R. Co., 45 Minn. 53, 47 N. W. 312; Hamilton v. Third Ave. R. Co., 53 N. Y. 25; Dorrah v. Illinois Cent. R. Co., 65 Miss. 14, 3 South. 36, 7 Am. St. Rep. 629; Chicago & A. R. Co. v. Flagg, 43 Ill. 364, 92 Am. Dec. 133. False Imprisonment. Jay v. Almy, 1 Woodb. & M. 262, Fed. Cas. No. 7,236; Catlin v. Pond, 101 N. Y. 649, 5 N. E. 41. Malicious Prosecution. Parkhurst v. Masteller, 57 Iowa, 474, 10 N. W. 864; Fagnan v. Knox, 40 N. Y. Super. Ct. 41; Wheeler v. Hanson, 161 Mass. 370, 37 N. E. 382, 42 Am. St. Rep. 408. Libel—Slander. Shattuc v. McArthur (C. C.) 29 Fed. 136; Terwilliger v. Wands, 17 N. Y. 54, 72 Am. Dec. 420; Wilson v. Goit, 17 N. Y. 442; Samuels v. Evening Mail Ass'n, 6 Hun (N. Y.) 5; Hamilton v. Eno, 16 Hun (N. Y.) 599; Lombard v. Lennox, 155 Mass. 70, 28 N. E. 1125, 31 Am. St. Rep. 528; Warner v. Press Publishing Co., 132 N. Y. 181, 30 N. E. 393. Seduction and Criminal Conversation. Irwin v. Dearman, 11 East, 23; Barbour v. Stephenson (C. C.) 32 Fed. 66; Johnston v. Disbrow, 47 Mich. 59, 10 N. W. 79; Emery v. Gowen, 4 Me. 33, 16 Am. Dec. 233; Hatch v. Fuller, 131 Mass. 574; Lipe v. Eisenlerd, 32 N. Y. 229. Abduction of Children. Magee v. Holland, 27 N. J. Law, 86, 72 Am. Dec. 341; Stowe v. Heywood, 7 Allen (Mass.) 118.



*Prospective Mental Suffering*

Damages may be recovered for prospective mental suffering.<sup>48</sup>

In personal injury cases, damages may be recovered for grief and mortification which will be caused in the future by any serious deformity and disfigurement.<sup>49</sup>

Damages for dread of hydrophobia may be recovered by one who has been bitten by a dog.<sup>50</sup>

While compensation for mental suffering alone cannot be recovered, where the same act that causes mental suffering also injures plaintiff in respect to a right protected by law, as in regard to his person, property, or reputation, the law, in redressing such injury, will also award to plaintiff a suitable compensation for his mental suffering, considered as an inseparable part of the general result of the tort against him.<sup>51</sup>

*Mental Suffering in Actions of Contract*

Upon the question as to whether damages are recoverable for mental suffering resulting from a breach of contract, the authorities are in conflict. It has been held that such damages as are recoverable are subject to the general limitation that damages for the breach of a contract must be proximate, certain, and contemplated at the time the contract was made.<sup>52</sup>

<sup>48</sup> *Matteson v. New York Cent. R. Co.*, 62 Barb. (N. Y.) 364; *Memphis & C. R. Co. v. Whitfield*, 44 Miss. 466, 7 Am. Rep. 699; *Squith & N. A. R. Co. v. McLendon*, 63 Ala. 266.

<sup>49</sup> *Heddles v. Chicago & N. W. Ry. Co.*, 77 Wis. 228, 46 N. W. 115, 20 Am. St. Rep. 106; *Power v. Harlow*, 57 Mich. 107, 23 N. W. 606. Contra: *Chicago, B. & Q. R. Co. v. Hines*, 45 Ill. App. 299; *Chicago, R. I. & P. Ry. Co. v. Caulfield*, 11 C. C. A. 552, 63 Fed. 396. See, also, *Southwestern Brewing & Ice Co. v. Schmidt*, 226 U. S. 162, 33 Sup. Ct. 68, 57 L. Ed. 170; *Bump v. Delaware, L. & W. R. Co.*, 157 App. Div. 102, 141 N. Y. Supp. 1009. Contra: *Cullen v. Higgins*, 216 Ill. 78, 74 N. E. 698.

<sup>50</sup> *Godeau v. Blood*, 52 Vt. 251, 36 Am. Rep. 751.

<sup>51</sup> *Lynch v. Knight*, 9 H. L. Cas. 577; *O'Flaherty v. Nassau Electric R. Co.*, 34 App. Div. 74, 54 N. Y. Supp. 96; *Trigg v. St. Louis, K. C. & N. Ry. Co.*, 74 Mo. 147, 41 Am. Rep. 305; *Burnett v. Western Union Telegraph Co.*, 39 Mo. App. 599; *Western Union Tel. Co. v. Rogers*, 68 Miss. 748, 9 South. 823, 13 L. R. A. 859, 24 Am. St. Rep. 300; *Summerfield v. Western Union Telegraph Co.*, 87 Wis. 1, 57 N. W. 973, 41 Am. St. Rep. 17; *Chapman v. Western Union Telegraph Co.*, 90 Ky. 265, 13 S. W. 880; *Garrison v. Sun Printing & Publishing Ass'n*, 207 N. Y. 1, 100 N. E. 430, 45 L. R. A. (N. S.) 766, Ann. Cas. 1914C, 288; *Hale, Dam.* (2d Ed.) § 41.

<sup>52</sup> *Wadsworth v. Western Union Telegraph Co.*, 86 Tenn. 695, 703, 8 S. W. 574, 6 Am. St. Rep. 864. Contra: *Francis v. Western Union Telegraph Co.*, 58 Minn. 252, 59 N. W. 1078, 25 L. R. A. 406, 49 Am. St. Rep. 507. In the following cases mental suffering has been held too remote or unexpected to be compensated: *Beasley v. Western Union Telegraph Co.* (C. C.) 39 Fed. 181; *Wells Fargo & Co.'s Express v. Fuller*, 4 Tex. Civ. App. 213, 23 S. W. 412;

There appears to be no reason why the form of the action should affect the question, though in most contracts such damages would not be the proximate consequence of the breach. There is much confusion in the decisions.<sup>53</sup>

The breach of a promise of marriage has always been regarded as an exception, and damages for mental suffering allowed.<sup>54</sup>

Actions against telegraph companies for delay or failure to deliver messages constitute by far the most numerous class of cases in which this question has been raised.

In the case of *So Relle v. Telegraph Co.*,<sup>55</sup> it was held that the addressee of a telegraphic message could recover, as compensatory damages, for the failure to deliver promptly a message announcing the death of his mother, by reason of which delay he was prevented from attending her funeral. And it is now well established in Texas that, where the nature of the message is such as to apprise the company that mental suffering will result from delay or failure to transmit it, compensation for such suffering can be recovered, though not connected with any physical injury or pecuniary loss.<sup>56</sup>

The "Texas Doctrine" has been followed in some other jurisdictions,<sup>57</sup> but repudiated in others, including the federal courts.<sup>58</sup>

*Nichols v. Eddy* (Tex. Civ. App.) 24 S. W. 316; *Thompson v. Western Union Telegraph Co.*, 107 N. C. 449, 12 S. E. 427.

<sup>53</sup> *Hale*, Dam. (2d Ed.) p. 160; *Sutherland*, Dam. (4th Ed.) § 92; *O'Rourke v. Cunard S. S. Co.*, 169 App. Div. 943, 154 N. Y. Supp. 29, where it is intimated that in New York there may be a recovery for mental anguish in an action of contract, citing cases at page 948 of 169 App. Div., and pages 33, 34, of 154 N. Y. Supp.

<sup>54</sup> *Collins v. Mack*, 31 Ark. 684; *Chellis v. Chapman*, 125 N. Y. 222, 26 N. E. 308, 11 L. R. A. 784; *Sherman v. Rawson*, 102 Mass. 395, 399; *Johnson v. Jenkins*, 24 N. Y. 252; *Thorn v. Knapp*, 42 N. Y. 474, 1 Am. Rep. 561.

<sup>55</sup> *So Relle v. Western Union Telegraph Co.*, 55 Tex. 308, 40 Am. Rep. 805.

<sup>56</sup> *Loper v. Western Union Telegraph Co.*, 70 Tex. 689, 8 S. W. 600; *Western Union Tel. Co. v. Broesche*, 72 Tex. 654, 10 S. W. 734, 13 Am. St. Rep. 843; *Western Union Tel. Co. v. Rosentreter*, 80 Tex. 406, 16 S. W. 25.

<sup>57</sup> *Western Union Tel. Co. v. Henderson*, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148; *Chapman v. Western Union Telegraph Co.*, 90 Ky. 265, 13 S. W. 880; *Mentzer v. Western Union Tel. Co.*, 93 Iowa, 752, 62 N. W. 1, 28 L. R. A. 72, 57 Am. St. Rep. 294.

<sup>58</sup> *Curtin v. Western Union Telegraph Co.*, 13 App. Div. 253, 42 N. Y. Supp. 1109; *Francis v. Western Union Telegraph Co.*, 58 Minn. 252, 59 N. W. 1078, 25 L. R. A. 406, 49 Am. St. Rep. 507; *Western Union Tel. Co. v. Rogers*, 68 Miss. 748, 9 South. 823, 13 L. R. A. 859, 24 Am. St. Rep. 300; *Summerfield v. Western Union Telegraph Co.*, 87 Wis. 1, 57 N. W. 973, 41 Am. St. Rep. 17; *Chapman v. Western Union Telegraph Co.*, 88 Ga. 763, 15 S. E. 901, 17 L. R. A. 430, 30 Am. St. Rep. 183; *International Ocean Tel. Co. v. Saunders*, 32 Fla. 434, 14 South. 148, 21 L. R. A. 810; *Chase v. Western Union Telegraph Co. (C. C.)* 44 Fed. 554, 10 L. R. A. 464; *Crawson v. Western Union Telegraph Co. (C. C.)* 47 Fed. 544. And see note by Wm. L. Clark, Jr.,

*Damages for Mental Suffering Compensatory, not Exemplary*

Damages for mental suffering, when allowed at all, are purely compensatory, not exemplary, vindictive, or punitive.<sup>59</sup>

## AGGRAVATION AND MITIGATION OF DAMAGES— REDUCTION

23. Where damages are not capable of exact pecuniary measurement, but must be left to the discretion of a jury, evidence of the circumstances of the wrong addressed to the jury for the purpose of influencing its estimate is said to be in aggravation or mitigation of damages.

The terms "aggravation" and "mitigation" of damages are properly used only where the damages are incapable of exact pecuniary measurement. Indemnity is the aim of the law. Where the exact loss is definitely known, the damages cannot be mitigated to less than full and complete compensation; nor can they be aggravated to more than that amount, unless the circumstances justify the imposition of exemplary damages. These terms are sometimes loosely used to mean evidence of anything that tends to increase or decrease the damages, but the proper sense is that indicated above.

It is for the jury to say whether the matters given in evidence aggravate or mitigate the damages. It is not a question of law for the court.<sup>60</sup>

"Nevertheless, certain rules as to the effect of some common circumstances (such as provocation, good faith, the position of the parties, etc.) in aggravating or mitigating the damages have been laid down, and are followed in ordinary cases, though, as has been said, they should not be regarded as conclusive. These rules are applied in actions of breach of promise of marriage and of tort for personal injury, and in all actions where exemplary damages are allowed."<sup>61</sup>

Ordinarily, evidence in aggravation or mitigation of damages, in the

in *Western Union Tel. Co. v. Coggin*, 68 Fed. 137, 15 C. C. A. 235, "Damages in Actions against Telegraph Companies." See, also, *Lynch v. Knight*, 9 H. L. Cas. 577, per Lord Wensleydale. See Hale, Dam. (2d Ed.) p. 164.

<sup>59</sup> *Smith v. Overby*, 30 Ga. 241; *Bixby v. Dunlap*, 56 N. H. 456, 22 Am. Rep. 475; *Thomp. Elect.* § 382; *Morris v. Duncan*, 126 Ga. 467, 54 S. E. 1045, 115 Am. St. Rep. 105. See Hale, Dam. (2d Ed.) p. 172.

<sup>60</sup> *Osmun v. Winters*, 25 Or. 260, 35 Pac. 250.

<sup>61</sup> *Sedg. Dam.* § 52. See, generally, as to aggravation and mitigation of damages, *Grable v. Margrave*, 3 Scam. (Ill.) 372, 38 Am. Dec. 88; *Storey v. Early*, 86 Ill. 461; *Sayre v. Sayre*, 25 N. J. Law, 235; *Duval v. Davey*, 32 Ohio St. 604; *Mahoney v. Belford*, 132 Mass. 393; *Sullivan v. Lowell & D. St. Ry. Co.*, 162 Mass. 536, 39 N. E. 185.

strict sense, is inadmissible in actions of contract. And in such actions the defendant's motive or intention in breaking the contract is not an element in the case, unless it belongs directly to the issue.<sup>62</sup>

### *Illustrations*

In assault and battery, leave and license,<sup>63</sup> and provocation,<sup>64</sup> are in mitigation of damages.<sup>65</sup>

In false imprisonment, wanton disregard of legal right entitles the plaintiff to punitive damages.<sup>66</sup>

So, proof of malice in defamation aggravates the wrong in libel and slander, while whatever negatives malice operates to mitigate damages.<sup>67</sup>

Provocation may mitigate damages;<sup>68</sup> and so may a retraction of defamatory statements, or proof of honest belief in rumors,<sup>69</sup> or proof of plaintiff's previously blemished character, or general bad reputation.<sup>70</sup>

## **24. An injured party cannot be compelled to accept specific reparation in lieu of damages; but, if he does so voluntarily, it will operate as a reduction of damages.**

Matter which tends to reduce definite pecuniary losses to a definite extent from what they appear to be upon the plaintiff's proof is called matter of reduction rather than mitigation; for example, specific reparation accepted in lieu of damages. But the right to damages upon the commission of a wrong is absolute; and therefore an offer of specific reparation unaccepted does not reduce the recovery.<sup>71</sup>

<sup>62</sup> 3 Pars. Cont. 167; Anson, Cont. 311.

<sup>63</sup> *Fredericksen v. Singer Mfg. Co.*, 38 Minn. 356, 37 N. W. 453; *Wiley v. Carpenter*, 64 Vt. 212, 23 Atl. 630, 15 L. R. A. 853.

<sup>64</sup> *Kiff v. Youmans*, 86 N. Y. 324, 40 Am. Rep. 543; *Birmingham Ry., Light & Power Co. v. Coleman*, 181 Ala. 478, 61 South. 890; *Bonino v. Caledonio*, 144 Mass. 299, 11 N. E. 98; *Genung v. Baldwin*, 77 App. Div. 584, 79 N. Y. Supp. 569.

<sup>65</sup> Cf. *Birchard v. Booth*, 4 Wis. 76; *Goldsmith's Adm'r v. Joy*, 61 Vt. 488, 17 Atl. 1010, 4 L. R. A. 500, 15 Am. St. Rep. 923.

<sup>66</sup> *Ball v. Horrigan*, 65 Hun. 621, 19 N. Y. Supp. 913.

<sup>67</sup> *Cruikshank v. Gordon*, 118 N. Y. 178, 23 N. E. 457.

<sup>68</sup> *Tarpley v. Blabey*, 2 Bing. N. C. 437.

<sup>69</sup> *Turton v. New York Recorder Co.*, 144 N. Y. 144, 38 N. E. 1009; *Nelson v. Wallace*, 48 Mo. App. 193.

<sup>70</sup> *Ward v. Dean*, 57 Hun. 585, 10 N. Y. Supp. 421; *Earl of Leicester v. Walter*, 2 Camp. 251; *Hallam v. Post Publishing Co. (C. C.)* 55 Fed. 456; *Post Pub. Co. v. Hallam*, 8 C. C. A. 201, 59 Fed. 530.

<sup>71</sup> *Norman v. Rogers*, 29 Ark. 365; *Livermore v. Northrup*, 44 N. Y. 107; *McCormick v. Pennsylvania Cent. R. Co.*, 80 N. Y. 353; *Perham v. Coney*, 117 Mass. 102. See Hale, Dam. (2d Ed.) p. 183; Sedgwick, Dam. § 53; Sutherland, Dam. § 156.

Where a contract to deliver property is once broken, a subsequent offer to deliver the property cannot be shown to reduce the damages.<sup>72</sup> And so it is generally held of an offer to restore property converted.<sup>73</sup>

Apart from the principles of aggravation and mitigation, or reduction, in their strict sense, the special circumstances of given cases, or special provisions of given contracts, may, of course, modify the general rules which would be applicable under ordinary circumstances, and operate, according to their nature, to either increase or lessen the damages recoverable. Thus, where rooms were let, with table board, for a fixed period and specified weekly payment, "with no deduction in case of absence," and the boarder left pending the term, it was held that he was liable to the other party, not merely for prospective profits, but for the full contract price.<sup>74</sup>

So, while, in an action for conversion of property of fluctuating value, the market value for a reasonable time, in which to replace the property, furnishes the guide to the proper measure of damages,<sup>75</sup> yet, if there is no market, and no market value, and in the absence of special circumstances, the value at the time of conversion, with interest, is the measure of compensation.<sup>76</sup>

So, again, if one is intrusted with property to be disposed of according to a contract between the parties, and an action is brought against him by the other party for a conversion thereof resulting in loss to the plaintiff, the defendant cannot resort to the contract which he has abandoned for the purpose of diminishing his liability, or to establish the measure of damages.<sup>77</sup>

<sup>72</sup> *Colby v. Reed*, 99 U. S. 560, 25 L. Ed. 484.

<sup>73</sup> *Stickney v. Allen*, 10 Gray (Mass.) 352; *Wooley v. Carter*, 7 N. J. Law, 85, 11 Am. Dec. 520; *Smith v. Hartog*, 23 Misc. Rep. 353, 51 N. Y. Supp. 257; *Munier v. Zachary*, 138 Iowa, 219, 114 N. W. 525, 18 L. R. A. (N. S.) 572, 16 Ann. Cas. 526.

Allowed in some states where conversion not willful, but merely technical. *Ward v. Moffett*, 38 Mo. App. 395; *Colby v. Reed*, 99 U. S. 560, 25 L. Ed. 484; *Whittler v. Sharp*, 43 Utah, 419, 135 Pac. 112, 49 L. R. A. (N. S.) 931.

<sup>74</sup> *Wilkinson v. Davies*, 146 N. Y. 25, 40 N. E. 501.

<sup>75</sup> *Baker v. Drake*, 53 N. Y. 211, 13 Am. Rep. 507.

<sup>76</sup> *Barnes v. Brown*, 130 N. Y. 372, 29 N. E. 760; *McIntyre v. Whitney*, 139 App. Div. 557, 124 N. Y. Supp. 234.

<sup>77</sup> *Hynes v. Patterson*, 95 N. Y. 6.

## EXEMPLARY DAMAGES

25. Exemplary, punitive, or vindictive damages are damages awarded in addition to compensation as a punishment to the defendant, and as a warning to other wrongdoers.
26. The authorities are in conflict as to whether exemplary damages can ever be allowed.
  - (a) In some jurisdictions, exemplary damages cannot be recovered.<sup>78</sup>
  - (b) In a few jurisdictions, exemplary damages, so called, may be recovered, but they are, in fact, compensatory.<sup>79</sup>
  - (c) In most jurisdictions, exemplary damages may be recovered in cases of aggravated torts.<sup>80</sup>

The doctrine of exemplary damages is anomalous and illogical. "It has been suffered to lean upon and support itself by the supposed weight of authority, rather than to stand upon principle and inherent strength."<sup>81</sup>

The fact remains, however, that, in a vast body of decisions, damages have been allowed strictly in poenam. The doctrine of these cases is to be sustained, if at all, mainly on the ground of authority.<sup>82</sup>

27. **WHEN RECOVERABLE**—In jurisdictions where exemplary damages are allowed, they can be recovered only in actions of tort,<sup>83</sup> and when the tort is accompanied by violence, oppression, gross negligence, malice, or fraud.

<sup>78</sup> *Stilson v. Gibbs*, 53 Mich. 280, 18 N. W. 815; *Murphy v. Hobbs*, 7 Colo. 541, 5 Pac. 119, 49 Am. Rep. 366; *Fay v. Parker*, 53 N. H. 342, 16 Am. Rep. 270; *Malone v. Belcher*, 216 Mass. 209, 103 N. E. 637, 49 L. R. A. (N. S.) 753, Ann. Cas. 1915A, 830.

Now allowed in Colorado by statute. *French v. Deane*, 19 Colo. 504, 36 Pac. 609, 24 L. R. A. 387.

<sup>79</sup> *Pegram v. Stortz*, 31 W. Va. 220, 6 S. E. 485, now overruled *Mayer v. Frobe*, 40 W. Va. 246, 22 S. E. 58; *Quigley v. Central Pac. Railroad Co.*, 11 Nev. 350, 21 Am. Rep. 757; *Stuyvesant v. Wilcox*, 92 Mich. 233, 52 N. W. 467, 31 Am. St. Rep. 580.

<sup>80</sup> *Day v. Woodworth*, 13 How. 363, 371, 14 L. Ed. 181; *Voltz v. Blackmar*, 64 N. Y. 444; *Emblen v. Myers*, 6 Hurl. & N. 54; *Milwaukee & St. P. Ry. Co. v. Arms*, 91 U. S. 489, 23 L. Ed. 374; *Missouri Pac. Ry. Co. v. Humes*, 115 U. S. 512, 6 Sup. Ct. 110, 29 L. Ed. 463; *Bundy v. Maginess*, 76 Cal. 532, 18 Pac. 668; *Dalton v. Beers*, 38 Conn. 529.

See full list of citations in *Sutherland, Dam.* (4th Ed.) p. 1266.

<sup>81</sup> *Field, Dam.* p. 79.

<sup>82</sup> *Sedg. Dam.* § 354.

<sup>83</sup> *Sedg. Dam.* § 370; *Anson, Cont.* 311; *Guildford v. Steamship Co.*, 9

- EXCEPTIONS—**(a) Exemplary damages may be recovered for breach of promise of marriage.<sup>84</sup>
- (b) In a few states exemplary damages may be recovered in an action on a statutory bond, where the breach of condition was a tort.<sup>85</sup>
- (c) In some jurisdictions, exemplary damages cannot be recovered where the tort is also a crime.<sup>86</sup>

Exemplary damages, being designed to punish the wrongdoer, can be justified only where the wrong was willful or wanton; and their allowance is limited to that class of cases.<sup>87</sup> Good faith,<sup>88</sup> and provocation,<sup>89</sup> may be shown in mitigation.

It is the province of the court to determine whether there is any evidence to support an award of exemplary damages,<sup>90</sup> and of the jury to determine whether or not such damages should be awarded.<sup>91</sup>

Can. Sup. Ct. 303; *Murdock v. Boston & A. Railroad Co.*, 133 Mass. 15, 43 Am. Rep. 480.

In contract, motive generally immaterial. *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U. S. 540, 23 Sup. Ct. 754, 47 L. Ed. 1171; *Western Union Tel. Co. v. Benson*, 159 Ala. 254, 48 South. 712; *Moon v. Interurban St. R. Co.*, 85 N. Y. Supp. 363.

But punitive damages have been allowed in some cases where the breach of contract is also a tort. *Hale, Dam.* (2d Ed.) p. 318; *Forrester v. Southern Pac. Co.*, 36 Nev. 247, 134 Pac. 753, 136 Pac. 705, 48 L. R. A. (N. S.) 1.

<sup>84</sup> *Johnson v. Jenkins*, 24 N. Y. 252; *Chellis v. Chapman*, 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784.

<sup>85</sup> *Floyd v. Hamilton*, 33 Ala. 235. *Contra*: *Cobb v. People*, 84 Ill. 511.

<sup>86</sup> *Murphy v. Hobbs*, 7 Colo. 541, 5 Pac. 119, 49 Am. Rep. 366. *Contra*: *Cook v. Ellis*, 6 Hill (N. Y.) 466, 41 Am. Dec. 757. But see *People v. Meakim*, 133 N. Y. 225, 30 N. E. 828. See, also, *White v. Sun Pub. Co.*, 164 Ind. 426, 73 N. E. 890. But see *Luther v. Shaw*, 157 Wis. 234, 147 N. W. 18, 52 L. R. A. (N. S.) 85, where defendant, after being punished by the state for seduction under promise of marriage, was mulcted in punitive damages by the woman in breach of promise and by the father in seduction.

<sup>87</sup> *Huling v. Henderson*, 161 Pa. 553, 29 Atl. 276; *Consolidated Coal Co. of St. Louis v. Haenni*, 146 Ill. 628, 35 N. E. 162; *Reeder v. Purdy*, 48 Ill. 261; *Moore v. Crose*, 43 Ind. 30; *Brown v. Allen*, 35 Iowa, 306; *United States v. Taylor* (C. C.) 35 Fed. 484; *Ames v. Hilton*, 70 Me. 36; *Sapp v. Northern Cent. Ry. Co.*, 51 Md. 115; *Railway Co. v. Lee*, 90 Tenn. 570, 18 S. W. 268; *Hamilton v. Third Ave. R. Co.*, 53 N. Y. 25; *Yates v. New York Cent. & H. R. Co.*, 67 N. Y. 100; *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282.

<sup>88</sup> *Millard v. Brown*, 35 N. Y. 297.

<sup>89</sup> *Kiff v. Youmans*, 86 N. Y. 331, 40 Am. Rep. 543.

<sup>90</sup> *Chicago, St. L. & N. O. R. Co. v. Scurr*, 59 Miss. 456, 42 Am. Rep. 373.

<sup>91</sup> *Pratt v. Pond*, 42 Conn. 318; *Merchants' & Planters' Oil Co. v. Kentucky Refining Co.*, 69 Fed. 218, 16 C. C. A. 212; *Whitmer v. El Paso & S. W. Co.*,

In suits in equity, exemplary damages are never given.<sup>92</sup>

When the circumstances justify it, exemplary damages may be recovered in actions for assault and battery,<sup>93</sup> false imprisonment,<sup>94</sup> malicious prosecution,<sup>95</sup> defamation;<sup>96</sup> also for willful injuries to person<sup>97</sup> or property,<sup>98</sup> and in actions of trover<sup>99</sup> and replevin.<sup>1</sup>

In actions founded on loss of service, as for enticement,<sup>2</sup> seduction,<sup>3</sup> criminal conversation,<sup>4</sup> and for harboring plaintiff's wife,<sup>5</sup> exemplary damages may be recovered.

In case of physical injury to a child or servant, exemplary damages can be recovered only in an action by the child or servant. They cannot be recovered in an action by the master or parent for loss of services.<sup>6</sup>

Where a wrongdoer dies before trial, only compensatory damages can be recovered against his estate. The liability to exemplary damages does not survive.<sup>7</sup>

201 Fed. 193, 119 C. C. A. 637; *Chicago Consol. Traction Co. v. Mahoney*, 230 Ill. 562, 82 N. E. 868; *Duroth Mfg. Co. v. Cauffiel*, 243 Pa. 24, 89 Atl. 798.

<sup>92</sup> *Bird v. Wilmington & M. R. Co.*, 8 Rich. Eq. (S. C.) 46, 64 Am. Dec. 739; *Karns v. Allen*, 135 Wis. 48, 115 N. W. 357, 15 Ann. Cas. 543; *U. S. v. Bernard*, 202 Fed. 728, 121 C. C. A. 190.

<sup>93</sup> *Connors v. Walsh*, 131 N. Y. 590, 30 N. E. 59; *Bundy v. Maginess*, 76 Cal. 532, 18 Pac. 668; *Cook v. Ellis*, 6 Hill (N. Y.) 466, 41 Am. Dec. 757.

<sup>94</sup> *Huckle v. Money*, 2 Wils. 205.

<sup>95</sup> *Donnell v. Jones*, 13 Ala. 490, 48 Am. Dec. 59.

<sup>96</sup> *Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. 202, 16 L. Ed. 73.

<sup>97</sup> *Dalton v. Beers*, 38 Conn. 529.

<sup>98</sup> *U. S. v. Taylor* (C. C.) 35 Fed. 484; *Allaback v. Utt*, 51 N. Y. 651; *Rimbaud v. Beiermeister*, 168 App. Div. 596, 154 N. Y. Supp. 333; *Groh v. South*, 121 Md. 639, 89 Atl. 321. And see *Vansant v. Kowalewski*, 5 Boyce (Del.) 92, 90 Atl. 421; *Connors v. Walsh*, 131 N. Y. 590, 30 N. E. 59; *Schmitt v. Kurrus*, 234 Ill. 578, 85 N. E. 261.

<sup>99</sup> *Dennis v. Barber*, 6 Serg. & R. (Pa.) 420. Contra: *Berry v. Vantries*, 12 Serg. & R. (Pa.) 89.

<sup>1</sup> *Cable v. Dakin*, 20 Wend. (N. Y.) 172.

<sup>2</sup> *Smith v. Goodman*, 75 Ga. 198.

<sup>3</sup> *Robinson v. Burton*, 5 Har. (Del.) 335.

<sup>4</sup> *Johnston v. Disbrow*, 47 Mich. 59, 10 N. W. 79.

<sup>5</sup> *Johnson v. Allen*, 100 N. C. 131, 5 S. E. 666.

<sup>6</sup> *Whitney v. Hitchcock*, 4 Denio (N. Y.) 461.

<sup>7</sup> *Edwards v. Ricks*, 30 La. Ann. 926; *Rippey v. Miller*, 33 N. C. 247.



## LIABILITY OF PRINCIPAL FOR ACT OF AGENT

28. A principal is not liable to exemplary damages for the tort of his agent or servant, unless he authorized or ratified the act as it was performed, or was himself guilty of negligence.<sup>8</sup>

**EXCEPTION**—In some jurisdictions, if the principal is liable for compensatory damages, he is liable also for exemplary damages, if the agent or servant would be.<sup>9</sup>

### *Liability of Corporations*

It is usually held that corporations are liable to exemplary damages for the acts of their agents or servants in cases where the agent or servant would be liable to such damages.<sup>10</sup>

In many jurisdictions, however, the same rule is applied to corporations as is applied to individuals, and the corporation is not liable unless it authorized or ratified the act, or is otherwise responsible for it.<sup>11</sup>

## AVOIDABLE CONSEQUENCES

29. Compensation cannot be recovered for injuries which the injured party, by due and reasonable diligence, after notice of the wrong, could have avoided. Such consequences are regarded as remote, the injured party's will having intervened as an independent cause.<sup>12</sup>

<sup>8</sup> The *Amiable Nancy*, 3 Wheat. 546, 4 L. Ed. 456; *Pollock v. Gantt*, 69 Ala. 373, 44 Am. Rep. 519; *Lienkauf v. Morris*, 66 Ala. 406; *Burns v. Campbell*, 71 Ala. 271; *Freese v. Tripp*, 70 Ill. 496.

<sup>9</sup> *Southern Exp. Co. v. Brown*, 67 Miss. 260, 7 South. 318, and 8 South. 425, 19 Am. St. Rep. 306. Cf. *Cleghorn v. New York Cent. & H. R. R. Co.*, 56 N. Y. 44, 15 Am. Rep. 375.

<sup>10</sup> *Citizens' St. Ry. Co. v. Steen*, 42 Ark. 321; *Illinois Cent. Ry. Co. v. Hammer*, 72 Ill. 353; *Southern Kansas R. Co. v. Rice*, 38 Kan. 398, 16 Pac. 817, 5 Am. St. Rep. 766; *Goddard v. Grand Trunk Ry. of Canada*, 57 Me. 202, 2 Am. Rep. 39; *Perkins v. Missouri, K. & T. R. Co.*, 55 Mo. 201; *Belknap v. Boston & M. R. Co.*, 49 N. H. 358; *Quinn v. South Carolina Ry. Co.*, 29 S. C. 381, 7 S. E. 614, 1 L. R. A. 682; *Forrester v. Southern P. Co.*, 36 Nev. 247, 134 Pac. 753, 136 Pac. 705, 48 L. R. A. (N. S.) 1.

<sup>11</sup> *Cleghorn v. New York Cent. & H. R. R. Co.*, 56 N. Y. 44, 15 Am. Rep. 375; *City Nat. Bank v. Jeffries*, 73 Ala. 183; *Murphy v. Central Park, N. & E. R. R. Co.*, 48 N. Y. Super. Ct. 96; *Keil v. Chartiers Val. Gas Co.*, 131 Pa. 466, 19 Atl. 78, 17 Am. St. Rep. 823; *Hagan v. Providence & W. R. Co.*, 3 R. I. 88, 62 Am. Dec. 377; *Lake Shore & M. S. Ry. Co. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97.

<sup>12</sup> *Loker v. Damon*, 17 Pick. (Mass.) 284; *Indianapolis, B. & W. Ry. Co. v.*

The rule applies in an action against a carrier for nondelivery, where the consignee can protect himself against loss by a purchase in the market.<sup>13</sup>

Where an employé is wrongfully discharged before the expiration of the term of service, he must seek other employment; and the measure of damages is the difference between what he might have earned and what he should have received under his contract.<sup>14</sup>

Reasonable diligence in seeking other employment does not require one to accept employment of an entirely different or inferior sort, or to abandon one's home and place of residence.<sup>15</sup>

### *Rule of Contributory Negligence Distinguished*

The rule of avoidable consequences must not be confounded with that of contributory negligence, though their results are somewhat similar. Contributory negligence is a complete bar to the maintenance of the action. It defeats the right to recover any damages whatever. On the other hand, the rule of avoidable consequences presupposes a valid cause of action. It has no application until a right to recover some damages at all events has arisen, and then it operates merely to reduce the amount of recovery. It cannot entirely defeat the action. Though plaintiff might have avoided the entire loss, yet, if an absolute right was invaded, he is entitled to nominal damages.<sup>16</sup>

Birney, 71 Ill. 391; Salladay v. Town of Dodgeville, 85 Wis. 318, 55 N. W. 696, 20 L. R. A. 541; Brant v. Gallup, 111 Ill. 487, 53 Am. Rep. 638; Grindle v. Eastern Express Co., 67 Me. 317, 24 Am. Rep. 31; Sutherland v. Wyer, 67 Me. 64; Simpson v. City of Keokuk, 34 Iowa, 568; Watkins v. Rist, 67 Vt. 284, 31 Atl. 413; Thompson v. Shattuck, 2 Metc. (Mass.) 615; Sherman Center Town Co. v. Leonard, 46 Kan. 354, 26 Pac. 717, 26 Am. St. Rep. 101; Suelzer v. Carpenter, 183 Ind. 23, 107 N. E. 467; Groh v. South, 119 Md. 297, 86 Atl. 1036; Fairfield v. City of Salem, 213 Mass. 296, 100 N. E. 542; Martin v. Pittsburgh Rys. Co., 238 Pa. 528, 86 Atl. 299, 48 L. R. A. (N. S.) 115.

<sup>13</sup> Scott v. Boston & New Orleans S. S. Co., 106 Mass. 468.

<sup>14</sup> Walworth v. Pool, 9 Ark. 394; McDaniel v. Parks, 19 Ark. 671; Sutherland v. Wyer, 67 Me. 64; Hoyt v. Wildfire, 3 Johns. (N. Y.) 518; Shannon v. Comstock, 21 Wend. (N. Y.) 457, 34 Am. Dec. 262; Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285; Hendrickson v. Anderson, 50 N. C. 246; King v. Steiren, 44 Pa. 99, 84 Am. Dec. 419; Gordon v. Brewster, 7 Wis. 355.

<sup>15</sup> Williams v. Chicago Coal Co., 60 Ill. 149; Costigan v. Mohawk & H. R. R. Co., 2 Denio (N. Y.) 609, 43 Am. Dec. 758; Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285; Fuchs v. Koerner, 107 N. Y. 529, 14 N. E. 445.

<sup>16</sup> Armfield v. Nash, 31 Miss. 361; Parker v. Meadows, 86 Tenn. 181, 6 S. W. 49.

## NOMINAL DAMAGES—DEFINITION AND GENERAL NATURE

30. Nominal damages are damages insignificant in amount; a sum of money that can be spoken of, but has no existence in point of quantity.
31. Nominal damages are awarded only in cases where the law presumes damage. Whenever the law presumes damage, it presumes the lowest possible amount; that is, nominal damages.
32. Whenever damages must be proved to show the violation of a legal right, proof of nominal damage will not support an action. The law applies the maxim, "*De minimis non curat lex.*"

In cases where damages are the gist of the action, proof of damage is essential to the proof of a legal wrong. In this class of cases, the law awards the amount of damages that have been proved. But there is another class of cases, in which damages are not the gist, and need not be proved, because they are presumed by law. This occurs whenever the conduct complained of is absolutely forbidden. In this class of cases a wrong can be shown without proof of damage. If no damages in fact are or can be proved, the legal presumption nevertheless remains.<sup>17</sup>

A riparian owner may recover nominal damages for a bare infringement of his rights.<sup>18</sup>

Nominal damages may be recovered for the unlawful flowage of lands,<sup>19</sup> or for false imprisonment.<sup>20</sup>

<sup>17</sup> *Barnes v. Brown*, 130 N. Y. 372, 29 N. E. 760; *Dayton v. Parke*, 142 N. Y. 403, 37 N. E. 642; *Webb v. Portland Mfg. Co.*, 3 Sumn. 189, Fed. Cas. No. 17,322; *New Jersey School & Church Furniture Co. v. Board of Education of Somerville*, 58 N. J. Law, 646, 35 Atl. 398; *Noble v. Hand*, 163 Mass. 289, 39 N. E. 1020; *Laffin v. Willard*, 16 Pick. (Mass.) 64, 26 Am. Dec. 629. See, also, *Whittemore v. Cutter*, 1 Gall. 429, 433, Fed. Cas. No. 17,600; *Davis v. Kendall*, 2 R. I. 566. Cf. *Paul v. Slason*, 22 Vt. 231, 54 Am. Dec. 75; *Mechem, Cas. Dam.* 8; *Ashby v. White*, 1 Ld. Raym. 938, 958; *Pig. Torts*, 10; *Suth. Dam.* 18; *Brown v. Mostoller*, 167 Iowa, 568, 149 N. W. 908; *Ideal Leather Goods Co. v. Eastern S. S. Corp.*, 220 Mass. 133, 107 N. E. 525; *Ochs v. Woods*, 160 App. Div. 740, 146 N. Y. Supp. 4.

<sup>18</sup> *New York Rubber Co. v. Rothery*, 132 N. Y. 293, 30 N. E. 841, 28 Am. St. Rep. 575; *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587, 6 South. 78, 4 L. R. A. 572, 11 Am. St. Rep. 72.

<sup>19</sup> *Chapman v. Copeland*, 55 Miss. 476; *Gerrish v. New Market Mfg. Co.*, 30 N. H. 478; *Amoskeag Mfg. Co. v. Goodale*, 46 N. H. 53.

<sup>20</sup> *Deyo v. Van Valkenburgh*, 5 Hill (N. Y.) 242.

In England it is held that, in an action against a public officer for neglect of duty, the plaintiff must show damage.<sup>21</sup> In America it is generally held that the officer is liable without proof of damage.<sup>22</sup>

### *Nominal Damages Establish Rights*

The principal purpose of allowing nominal damages is the establishment of rights.<sup>23</sup>

The importance of the right to recover nominal damages often consists in its effect on costs.<sup>24</sup>

## PENAL BONDS

**33. In an action on a penal bond, the measure of damages is compensation for the actual loss, not exceeding the penalty named.**

Questions involving a consideration of liquidated damages and penalties formerly arose chiefly in connection with that peculiar form of obligation known as a "common-law bond."<sup>25</sup>

Chancery assumed jurisdiction to relieve against the penalty in all cases of default, from whatever cause, on the payment of just compensation. This practice was ultimately followed by courts of law, and was finally sanctioned by statute.<sup>26</sup> In many jurisdictions interest may be recovered in addition to the penalty from the time of the breach.<sup>27</sup>

<sup>21</sup> Wood, Mayne, Dam. 11; Wylie v. Birch, 4 Q. B. 566.

<sup>22</sup> Lafin v. Willard, 16 Pick. (Mass.) 64, 26 Am. Dec. 629; Mickles v. Hart, 1 Denio (N. Y.) 548; Francis v. Schoellkopf, 53 N. Y. 152.

<sup>23</sup> Webb v. Portland Mfg. Co., 3 Sumn. 189, Fed. Cas. No. 17,322; Hathorne v. Stinson, 12 Me. 183, 28 Am. Dec. 167. See, also, Seidensparger v. Spear, 17 Me. 123, 35 Am. Dec. 234; Chapman v. Thames Mfg. Co., 13 Conn. 269, 33 Am. Dec. 401; Devendorf v. Wert, 42 Barb. (N. Y.) 227; Thomas v. Brackney, 17 Barb. (N. Y.) 654; Carhart v. Auburn Gaslight Co., 22 Barb. (N. Y.) 297; Tunbridge Wells Dipper's Case, 2 Wils. 414.

<sup>24</sup> Potter v. Mellen, 36 Minn. 122, 30 N. W. 438; Ely v. Parsons, 55 Conn. 83, 10 Atl. 499.

<sup>25</sup> See 3 Bl. Comm. 434.

<sup>26</sup> Betts v. Burch, 4 Hurl. & N. 506. See 2 White & T. Lead. Cas. Eq. 1098.

<sup>27</sup> So in New York, Code Civ. Proc. § 1915; Brainard v. Jones, 18 N. Y. 35; Wyman v. Robinson, 73 Me. 384, 40 Am. Rep. 360; Long's Adm'r v. Long, 16 N. J. Eq. 59. Contra: Fraser v. Little, 13 Mich. 195, 87 Am. Dec. 741. See Sutherland, Dam. (4th Ed.) § 478.

## LIQUIDATED DAMAGES AND PENALTIES

34. Liquidated damages are damages agreed upon by the parties as and for compensation for, and in lieu of, the actual damages arising from a breach of contract.<sup>28</sup>
35. A penalty is a sum agreed to be paid or forfeited absolutely upon nonperformance of the contract, regardless of the actual damages suffered, and intended rather to secure performance than as compensation for a breach.
36. Where the parties to a contract agree upon liquidated damages, the sum fixed is the measure of damages for a breach, whether it exceeds or falls short of the actual damages; but, where the sum fixed is a penalty, the actual damages suffered, whether more or less, may be recovered.

### *Intent of the Parties*

In making contracts, the parties are at perfect liberty to stipulate for liquidated damages to be paid by one party to the other as compensation for a breach.<sup>29</sup>

To have this effect, it is, of course, primarily essential that the parties so intended.<sup>30</sup>

## SAME—RULES OF CONSTRUCTION

37. In seeking to ascertain the real intent, the courts lean towards a construction that the sum fixed is a penalty, rather than liquidated damages. The language of the parties is not conclusive.<sup>31</sup>

<sup>28</sup> Dwinel v. Brown, 54 Me. 468, 474, per Appleton, C. J., dissenting.

<sup>29</sup> In an action to recover a sum stipulated in a contract as liquidated damages, no proof of actual damages is required. Sanford v. First Nat. Bank of Belle Plaine, 94 Iowa, 680, 63 N. W. 459. Contract of employment; damages for discharge stipulated at two weeks' wages. Watson v. Russell, 149 N. Y. 388, 44 N. E. 161. See, also, Clydebank, etc., Co. v. Yzquierdo [1905] A. C. 6; Sun Printing & Pub. Ass'n v. Moore, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366; Guerin v. Stacy, 175 Mass. 595, 56 N. E. 892; Conried Metropolitan Opera Co. v. Brin, 66 Misc. Rep. 282, 123 N. Y. Supp. 6.

<sup>30</sup> Kemp v. Knickerbocker Ice Co., 69 N. Y. 45; Crisdee v. Bolton, 3 Car. & P. 240. See, also, Dwinel v. Brown, 54 Me. 468; Noyes v. Phillips, 60 N. Y. 408; Clement v. Cash, 21 N. Y. 253; Lampman v. Cochran, 16 N. Y. 275; Condon v. Kemper, 47 Kan. 126, 27 Pac. 829, 13 L. R. A. 671. See Hale, Dam. (2d Ed.) p. 196.

<sup>31</sup> Doane v. Chicago City Ry. Co., 51 Ill. App. 353; Condon v. Kemper, 47 Kan. 126, 27 Pac. 829, 13 L. R. A. 671; Tode v. Gross, 127 N. Y. 487, 28 N. E.

There are at least four forms of contracts in which the question under discussion is usually presented:

First. The contract may be to do or refrain from doing a particular thing, or, in the alternative, to pay a stipulated sum of money. *Prima facie*, it is an alternative contract, but may be a mere cloak to cover a penalty.<sup>32</sup>

Second. The contract may be in the form of a common-law bond. *Prima facie*, the sum stipulated in a bond is a penalty; but, nevertheless, it has sometimes been held to be liquidated damages.<sup>33</sup>

Third. The contract may bind the parties to do or refrain from doing a certain thing, and provide that, in case of default, a certain sum shall be paid as a penalty. *Prima facie*, the sum named in this class of contracts is a penalty; but the presumption is not so strong as in the case of bonds.<sup>34</sup>

Fourth. The agreement may be in the same form as the last, except that the stipulated sum is called "liquidated damages" or a "forfeiture." This language will be given its literal effect only where the sum named was, in fact, reasonable compensation for a breach,<sup>35</sup> as of the time when the contract was made.<sup>36</sup>

**38. Where the stipulated sum is wholly collateral to the object of the contract, and is evidently inserted in terrorem as security for performance, it will be construed to be a penalty.<sup>37</sup>**

469, 13 L. R. A. 652, 24 Am. St. Rep. 475; *Advance Amusement Co. v. Franke*, 268 Ill. 579, 109 N. E. 471; *City of Summit v. Morris County Traction Co.*, 85 N. J. Law, 193, 88 Atl. 1048, L. R. A. 1915E, 385.

As to whether there is a presumption against liquidated damages there is much confusion of opinion. *Sutherland*, Dam. (4th Ed.) § 283. See *Dopp v. Richards*, 43 Utah, 332, 135 Pac. 98.

<sup>32</sup> *Standard Button Fastening Co. v. Breed*, 163 Mass. 10, 39 N. E. 346. See post, "Alternative Contracts." See *Hale*, Dam. (2d Ed.) p. 203.

<sup>33</sup> *Studabaker v. White*, 31 Ind. 212, 99 Am. Dec. 628; *Fisk v. Fowler*, 10 Cal. 512; *Duffy v. Shockey*, 11 Ind. 70, 71 Am. Dec. 348; *Clark v. Barnard*, 108 U. S. 436, 453, 2 Sup. Ct. 878, 27 L. Ed. 780.

<sup>34</sup> *Suth. Dam.* § 284. Cf. *Law v. Local Board*, [1892] 1 Q. B. 130.

<sup>35</sup> *Grand Tower Min. Mfg. & Transp. Co. v. Phillips*, 23 Wall. 471, 23 L. Ed. 71; *Hamilton v. Moore*, 33 U. C. Q. B. 520.

<sup>36</sup> As in any case of construction, the reasonableness of the amount stipulated and uncertainty of the probable damage must be determined as of the time when the contract was made. *Kimboo v. Wells*, 112 Ark. 126, 165 S. W. 645; *Vaulx v. Buntin*, 127 Tenn. 118, 153 S. W. 481; *Dunn v. Morgenthau*, 73 App. Div. 147, 76 N. Y. Supp. 827.

<sup>37</sup> *Henry v. Davis*, 123 Mass. 345; *Spear v. Smith*, 1 Denio (N. Y.) 464; *Henderson v. Cansler*, 65 N. C. 542; *Brown v. Bellows*, 4 Pick. (Mass.) 179; *Robeson v. Whitesides*, 16 Serg. & R. (Pa.) 320; *Burr v. Todd*, 41 Pa. 206; *Merrill v. Merrill*, 15 Mass. 488; *Burrage v. Crump*, 48 N. C. 330; *Johnston v. Frederick Stearns & Co.*, 160 Mich. 247, 125 N. W. 29.

39. Where the stipulated sum is to be paid on the nonpayment of a less amount, or on failure to do something of less value, it will generally be construed to be a penalty.<sup>38</sup>
40. Where the actual damages arising from a breach may be either greatly more or greatly less than the stipulated sum, according to the time of the breach, such sum will usually be regarded as a penalty.<sup>39</sup>

And, generally, where a contract provides for payment in installments, and stipulates that a certain proportion shall be retained from each installment, the whole to be forfeited upon a breach, the sum retained is considered a penalty.<sup>40</sup>

41. Where the damages resulting from a breach of contract cannot be measured by any definite pecuniary standard, as by market value or the like, but are wholly uncertain, the law favors a liquidation of the damages by the parties themselves; and, where they stipulate for a reasonable amount, it will be enforced.<sup>41</sup>

Thus, stipulations for liquidated damages have been upheld in actions for breach of marriage promise;<sup>42</sup> breach of contract for the sale of property of uncertain value;<sup>43</sup> breach of agreement not to carry on business.<sup>44</sup>

<sup>38</sup> *Suth. Dam.* § 288; *Mayne, Dam.* 166; *Thompson v. Hudson*, L. R. 4 H. L. 1, L. R. 2 Eq. 612; *Ashtown's Lessee v. White*, 11 Ir. Law R. 400; *McNitt v. Clark*, 7 Johns. (N. Y.) 465. See *Hale, Dam.* (2d Ed.) p. 205.

<sup>39</sup> *Davis v. Freeman*, 10 Mich. 188; *Richardson v. Woehler*, 26 Mich. 90; *Sedgwick, Dam.* (9th Ed.) § 412.

<sup>40</sup> *Savannah & C. R. Co. v. Callahan*, 56 Ga. 331. But, where the sum was not excessive, it has been allowed as liquidated damages. See *Elizabethtown & P. R. Co. v. Geoghegan*, 9 Bush (Ky.) 56. See *Sedgwick, Dam.* (9th Ed.) § 412.

<sup>41</sup> *Kelso v. Reid*, 145 Pa. 606, 23 Atl. 323, 27 Am. St. Rep. 716; *De Soysa v. De Pless Pol*, [1912] App. Cas. 194; *Sun Printing & Pub. Ass'n v. Moore*, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366; *Whitfield v. Levy*, 35 N. J. Law, 149; *Feyer v. Russ*, 154 App. Div. 272, 138 N. Y. Supp. 964.

<sup>42</sup> *Lowe v. Peers*, 4 Burrows, 2225.

<sup>43</sup> *Gammon v. Howe*, 14 Me. 250. In New York it is held that the damages for breach of an ordinary contract for the sale or exchange of lands are not uncertain, and a stipulation for liquidated damages cannot be sustained upon this ground. *Noyes v. Phillips*, 60 N. Y. 408; *Richards v. Edick*, 17 Barb. 260; *Laurea v. Bernauer*, 33 Hun, 307. But if the sum fixed is reasonable in amount, and clearly intended as compensation, it is recoverable as liquidated damages. *Slosson v. Beadle*, 7 Johns. 72; *Hasbrouck v. Tappen*, 15 Johns.

<sup>44</sup> See footnote 44 on following page.

42. Where damages can be easily and precisely determined by a definite pecuniary standard, as by proof of market values, but the parties have stipulated for a much larger sum, such sum will usually be held to be a penalty; for it is evident that the principle of compensation has been disregarded.<sup>45</sup>

But the parties may stipulate for compensation for losses which the law would regard as too remote or uncertain to be considered; and, if the stipulation is reasonable, it will be enforced as liquidated damages.<sup>46</sup>

43. Where a sum is deposited, and the contract declares that it shall be forfeited for nonperformance, if reasonable in amount, it will be enforced as liquidated damages;<sup>47</sup> otherwise it must be returned.<sup>48</sup>

200; *Knapp v. Maltby*, 13 Wend. 587. Otherwise not. *Dennis v. Cummins*, 3 Johns. Cas. 297, 2 Am. Dec. 160; *Beveridge v. West Side Const. Co.*, 130 App. Div. 139, 114 N. Y. Supp. 521; *Feinsot v. Burstein* (City Ct. N. Y.) 141 N. Y. Supp. 330; *Vito v. Birkel*, 209 Pa. 206, 58 Atl. 127.

<sup>44</sup> *Jaquith v. Hudson*, 5 Mich. 123; *Tode v. Gross*, 127 N. Y. 480, 28 N. E. 469, 13 L. R. A. 652, 24 Am. St. Rep. 475. Delay in the performance of contracts. *Fletcher v. Dyche*, 2 Term R. 32; *Curtis v. Brewer*, 17 Pick. (Mass.) 513; *Bridges v. Hyatt*, 2 Abb. Prac. (N. Y.) 449; *O'Donnell v. Rosenberg*, 14 Abb. Prac. N. S. (N. Y.) 59; *Farnham v. Ross*, 2 N. Y. Super. Ct. 187; *Weeks v. Little*, 47 N. Y. Super. Ct. 1; *Monmouth Park Ass'n v. Wallis Iron Works*, 55 N. J. Law, 132, 26 Atl. 140, 19 L. R. A. 456, 39 Am. St. Rep. 626. Cf. *Wilcus v. Kling*, 87 Ill. 107; *Ward v. Hudson River Bldg. Co.*, 125 N. Y. 230, 235, 26 N. E. 256.

<sup>45</sup> *Suth. Dam.* § 289; *Fisher v. Bidwell*, 27 Conn. 363; *Stewart v. Grier*, 7 Houst. 378, 32 Atl. 328.

<sup>46</sup> *Jaqua v. Headington*, 114 Ind. 309, 16 N. E. 527; *Manice v. Brady*, 15 Abb. Prac. (N. Y.) 173; *Cotheal v. Talmage*, 9 N. Y. 551, 61 Am. Dec. 716; *Knapp v. Maltby*, 13 Wend. (N. Y.) 587; *Powell v. Burroughs*, 54 Pa. 329. But if the sum fixed varies materially from a just compensation, or if the intention is doubtful, the sum will be held a penalty. *Dennis v. Cummins*, 3 Johns. Cas. (N. Y.) 297, 2 Am. Dec. 160; *Esmond v. Van Benschoten*, 12 Barb. (N. Y.) 366. A provision in a lease for \$5,000 damages, to cover interruption of earnings and other losses in addition to unpaid rent, in case of breach by the lessee, must be held to be a penalty. *Gay Mfg. Co. v. Camp*, 25 U. S. App. 134, 13 C. C. A. 137, and 65 Fed. 794.

<sup>47</sup> *Reilly v. Jones*, 1 Bing. 302; *Hinton v. Sparkes*, L. R. 3 C. P. 161; *Swift v. Powell*, 44 Ga. 123; *Perzell v. Shook*, 53 N. Y. Super. Ct. (N. Y.) 501; *Wallis v. Smith*, 21 Ch. Div. 243; *Chaude v. Shepard*, 122 N. Y. 397, 25 N. E. 358. See *In re Dagenham (Thames) Dock Co.*, 8 Ch. App. 1022.

<sup>48</sup> *Schreiber v. Cohen*, 38 Misc. Rep. 546, 77 N. Y. Supp. 1081; *Advance Amusement Co. v. Franke*, 268 Ill. 579, 109 N. E. 471; *Graham v. City of Lebanon*, 240 Pa. 337, 87 Atl. 567.



44. Where the stipulated sum is to be paid on any breach of a contract containing several stipulations of widely different degrees of importance, it is usually held to be a penalty.<sup>49</sup>
45. A sum stipulated to be paid upon a breach of contract cannot be recovered as liquidated damages for a partial breach, for one sum cannot consistently be compensation alike for either a total or a partial breach;<sup>50</sup> and, if it appears from the language used that the stipulation was meant to be applicable only to a total breach, it will be disregarded in an action for a partial breach.<sup>51</sup>

So, also, a partial breach may justify the other party in treating the contract as at an end. So, the sum named may be recovered; but, if he accepts part performance, it cannot.<sup>52</sup>

46. Where the sum stipulated to be paid on the breach of a contract would exceed legal interest, it will generally be treated as a penalty.<sup>53</sup>

<sup>49</sup> *Watts v. Camors*, 115 U. S. 360, 6 Sup. Ct. 91, 29 L. Ed. 406; *Wilhelm v. Eaves*, 21 Or. 194, 27 Pac. 1053, 14 L. R. A. 297; *Bignall v. Gould*, 119 U. S. 495, 7 Sup. Ct. 294, 30 L. Ed. 491; *Lyman v. Babcock*, 40 Wis. 503, 517; *Kemble v. Farren*, 6 Bing. 141; *Keck v. Bieber*, 148 Pa. 645, 24 Atl. 170, 33 Am. St. Rep. 846; *Hathaway v. Lynn*, 75 Wis. 186, 43 N. W. 956, 6 L. R. A. 551; *Trustees of First Orthodox Congregational Church of Middleville v. Walrath*, 27 Mich. 232; *Trower v. Elder*, 77 Ill. 453; *Clement v. Cash*, 21 N. Y. 253; *Niver v. Rossman*, 18 Barb. (N. Y.) 50; *Staples v. Parker*, 41 Barb. (N. Y.) 648; *Lansing v. Dodd*, 45 N. J. Law, 525; *Chase v. Allen*, 13 Gray (Mass.) 42; *Gibbs v. Cooper*, 86 N. J. Law, 226, 90 Atl. 1115; *Advance Amusement Co. v. Franke*, 268 Ill. 579, 109 N. E. 471.

<sup>50</sup> *Sedg. Dam.* § 415; *Sutherland, Dam.* (4th Ed.) § 294; *Hale, Dam.* (2d Ed.) p. 219; *Grant v. Pratt & Lambert*, 52 App. Div. 540, 65 N. Y. Supp. 486.

<sup>51</sup> *Cook v. Finch*, 19 Minn. 407 (Gil. 350); *Morrison v. Richardson*, 194 Mass. 370, 80 N. E. 468.

<sup>52</sup> *Wibaux v. Grinnell Live Stock Co.*, 9 Mont. 154, 165, 22 Pac. 492; *Hoagland v. Segur*, 38 N. J. Law, 230; *Lampman v. Cochran*, 16 N. Y. 275, per *Shankland, J.*; *Shiell v. McNitt*, 9 Paige (N. Y.) 101; *Mundy v. Culver*, 18 Barb. (N. Y.) 336; *Town of Wheatland v. Taylor*, 29 Hun (N. Y.) 70; *Chase v. Allen*, 13 Gray (Mass.) 42.

<sup>53</sup> *Clark v. Kay*, 26 Ga. 403; *Kurtz v. Sponable*, 6 Kan. 395; *Davis v. Freeman*, 10 Mich. 188; *State to Use of Muskingum Fund Com'rs v. Taylor*, 10 Ohio, 378; *Gray v. Crosby*, 18 Johns. (N. Y.) 219, 226. But see *Lawrence v. Cowles*, 13 Ill. 577. Within the bounds of the legal rate of interest, parties may liquidate damages for nonpayment of money when due. *Hackenberry v. Shaw*, 11 Ind. 392; *Dagget v. Pratt*, 15 Mass. 177; *Gay v. Berkey*, 137 Mich. 658, 100 N. W. 920; *Sumner v. People*, 29 N. Y. 337; *Ramsey v. Morrison*, 39 N. J. Law, 591; *Sutherland, Dam.* (4th Ed.) § 318.

## ALTERNATIVE CONTRACTS

### 47. The measure of damages for the breach of an alternative contract is compensation for the least beneficial alternative.

An alternative contract is one which may be executed by doing either of several acts, at the election of the party from whom performance is due.<sup>54</sup>

The contract is completely performed when any one of the alternatives is performed, and so, of course, no question of damages for a breach arises. An alternative contract is not a contract for liquidated damages.<sup>55</sup>

To constitute an alternative contract, there must have been an intention to really give the party an option. When this is the case, the damages for a breach are limited to compensation for the least beneficial alternative.<sup>56</sup> Where, however, there is an absolute engagement to do a thing, and, if not, to pay a sum of money, the damages for not doing the thing are the sum of money.<sup>57</sup> In such a case the party has no option,<sup>58</sup> and the agreement is one for liquidated damages. Where the contract is to do a certain thing or to pay a certain sum of money, he has usually had his election, and payment of the money may be enforced.<sup>59</sup>

<sup>54</sup> *Suth. Dam.* (4th Ed.) § 282; *Sedgwick, Dam.* (9th Ed.) § 421.

<sup>55</sup> *Smith v. Bergengren*, 153 Mass. 236, 26 N. E. 690, 10 L. R. A. 768; *Strickland v. Williams*, [1899] 1 Q. B. 382.

<sup>56</sup> *Sedg. Dam.* § 421.

<sup>57</sup> *Deverill v. Burnell*, L. R. 8 C. P. 475; *Stewart v. Bedell*, 79 Pa. 336; *Crane v. Peer*, 43 N. J. Eq. 553, 4 Atl. 72, collecting cases. But see *Hahn v. Concordia Society of Baltimore City*, 42 Md. 460.

<sup>58</sup> Equity may enforce performance or enjoin a violation. *Ayres v. Pease*, 12 Wend. (N. Y.) 393; *Phenix Ins. Co. v. Continental Ins. Co.*, 14 Abb. Prac. N. S. (N. Y.) 266; *Long v. Bowring*, 33 Beav. 585; *Gray v. Crosby*, 18 Johns. (N. Y.) 219; *Chilliner v. Chilliner*, 2 Ves. Sr. 528; *Ingeldew v. Cripps*, 2 Ld. Raym. 814; *Lampman v. Cochran*, 16 N. Y. 275; *Ward v. Jewett*, 27 N. Y. Super. Ct. 714; *Robeson v. Whitesides*, 16 Serg. & R. (Pa.) 320; *National Provincial Bank v. Marshall*, 40 Ch. Div. 112.

<sup>59</sup> *Pearson v. Williams' Adm'rs*, 24 Wend. (N. Y.) 244; *Id.*, 26 Wend. (N. Y.) 630; *Hodges v. King*, 7 Metc. (Mass.) 583; *Slosson v. Beadle*, 7 Johns. (N. Y.) 72. See, also, *Morrell v. Irving Fire Ins. Co.*, 33 N. Y. 429, 88 Am. Dec. 396. This rule is difficult to reconcile with that of the least beneficial alternative. Its practical effect is to make an alternative contract one for liquidated damages, with this difference: that specific performance of a contract can be enforced, though it stipulate for liquidated damages, while, in alternative contracts, only the alternative chosen can be enforced. See *Crane v. Peer*, 43 N. J. Eq. 553, 558, 4 Atl. 72, and *Suth. Dam.* § 282. In *Smith v. Bergengren*, 153 Mass. 236, 26 N. E. 690, 10 L. R. A. 768, it was held that a covenant not to practice medicine in a certain town so long as the plaintiff

## ENTIRETY OF DEMAND

48. All the damage resulting from a single cause of action must be recovered in a single action. The demand cannot be split, and separate actions maintained for the separate items of damage.

A single cause of action gives rise to but a single demand for damages. Plaintiff must demand the full amount of damages to which he is entitled in one suit, and a judgment therein is a bar to any subsequent suit on the same cause of action, even though losses arise subsequently, which could not have been foreseen or proved at the time of the former suit. When an award of damages has been once made for a wrong, that wrong is redressed. Losses subsequently arising, without a renewal or continuance of the conduct, are *damnum absque injuria*.<sup>60</sup>

## TIME TO WHICH COMPENSATION MAY BE RECOVERED —PAST AND FUTURE LOSSES

49. The damages recoverable in an action include compensation, not only for losses already sustained at the time of beginning the action, but also for losses which have arisen subsequently, and for prospective losses, if such losses are the certain and proximate results of the cause of action, and do not themselves constitute a new cause of action.

If, pending a fixed term of employment, the employé is wrongfully discharged, he may bring his action for damages at once, without waiting for the expiration of the term, and in some states may recover

should remain in practice there, but containing a provision that defendant might resume practice provided he would pay plaintiff a certain sum, did not provide for either a penalty or liquidated damages. The sum named was a price fixed for what the contract permitted him to do if he paid. *Russell v. Wright*, 23 S. D. 338, 121 N. W. 842; *Levy v. Goldsoll*, 62 Tex. Civ. App. 257, 131 S. W. 420.

<sup>60</sup> *Wichita & W. R. Co. v. Beebe*, 39 Kan. 465, 18 Pac. 502; *Hill v. Joy*, 149 Pa. 243, 24 Atl. 293; *Howell v. Goodrich*, 69 Ill. 556; *Pierro v. St. Paul & N. P. Ry. Co.*, 39 Minn. 451, 40 N. W. 520, 12 Am. St. Rep. 673; *Winslow v. Stokes*, 48 N. C. 285, 67 Am. Dec. 242; *Fetter v. Beal*, 1 Ld. Raym. 339, 692, 1 Salk. 11. Compare, for illustrations of separate causes of action, *Secor v. Sturgis*, 16 N. Y. 548; *Nathans v. Hoper*, 77 N. Y. 420.

As to contracts for sale and delivery of goods in installments, see *Nichols v. Scranton Steel Co.*, 137 N. Y. 471, 33 N. E. 561; *Wharton & Co. v. Winch*, 140 N. Y. 287, 35 N. E. 589; *Atkins v. Trowbridge*, 162 App. Div. 161, 147 N. Y. Supp. 275; *Sutherland*, *Dam.* (4th Ed.) § 106.

damages, based upon both past and prospective loss of wages,<sup>61</sup> while in others he can only recover for loss of wages up to the time of the trial.<sup>62</sup>

If, at the time of the discharge, his wages are then paid in full, only one action will lie to recover damages, based on future wages, even though they were by the contract made payable in installments.<sup>63</sup>

The employé discharged during the term of employment may either (1) sue during the term, for damages; or (2) treat the contract as rescinded, and sue on the quantum meruit for the work actually performed; or (3) wait until the expiration of the term, and claim as damages the wages agreed on, less what he has or could have earned after his discharge, and pending the term.<sup>64</sup>

"Damage to goods and injury to the person, although they have been occasioned by one and the same wrongful act, are infringements of different rights, and give rise to distinct causes of action; and therefore the recovery, in an action, of compensation for the damage to the goods, is no bar to an action subsequently commenced for the injury to the person."<sup>65</sup>

<sup>61</sup> *Cutter v. Gillette*, 163 Mass. 95, 39 N. E. 1010; *Remelee v. Hall*, 31 Vt. 582, 76 Am. Dec. 140; *Sutherland v. Wyer*, 67 Me. 64; *King v. Steiren*, 44 Pa. 99, 84 Am. Dec. 419; *Seymour v. Oelrichs*, 156 Cal. 782, 106 Pac. 88, 134 Am. St. Rep. 154; *Doherty v. Schipper & Block*, 250 Ill. 128, 95 N. E. 74, 34 L. R. A. (N. S.) 557, Ann. Cas. 1912B, 364; *Davis v. Dodge*, 126 App. Div. 469, 110 N. Y. Supp. 787.

<sup>62</sup> *Bassett v. French*, 10 Misc. Rep. 675, 31 N. Y. Supp. 667; *Zender v. Seliger-Toothill Co.*, 17 Misc. Rep. 126, 39 N. Y. Supp. 346; *Jordan v. Patterson*, 67 Conn. 480, 35 Atl. 521; *Fowler v. Armour*, 24 Ala. 194; *Lichtenstein v. Brooks*, 75 Tex. 196, 12 S. W. 975; *Gordon v. Brewster*, 7 Wis. 355. And see the dictum in *Everson v. Powers*, 89 N. Y. 527, 42 Am. Rep. 319; *Smith v. Cashie & Chowan R. & Lumber Co.*, 142 N. C. 26, 54 S. E. 788, 5 L. R. A. (N. S.) 439.

<sup>63</sup> *James v. Allen Co.*, 44 Ohio St. 226, 6 N. E. 246, 58 Am. Rep. 821. Cf. *Mount Hope Cemetery Ass'n v. Weidenmann*, 139 Ill. 67, 28 N. E. 834.

Contra, that successive actions may be brought for each wage period. *McMullan v. Dickinson Co.*, 60 Minn. 156, 62 N. W. 120, 27 L. R. A. 409, 51 Am. St. Rep. 511.

<sup>64</sup> *Colburn v. Woodworth*, 31 Barb. (N. Y.) 381, 383; *Davidson v. Laughlin*, 138 Cal. 320, 71 Pac. 345, 5 L. R. A. (N. S.) 579; *Posner v. Seder*, 184 Mass. 331, 68 N. E. 335; *Gilbert v. Grubel*, 82 Kan. 476, 108 Pac. 798; *Milage v. Woodward*, 186 N. Y. 252, 78 N. E. 873.

Quantum meruit. *Hall v. Gunter & Gunter*, 157 Ala. 375, 47 South. 155; *Stephen v. Camden & Philadelphia Soap Co.*, 75 N. J. Law, 648, 68 Atl. 69; *Welch v. Livingston*, 33 Misc. Rep. 116, 67 N. Y. Supp. 149.

<sup>65</sup> *Brunsdon v. Humphrey*, 14 Q. B. Div. 141; *Reilly v. Sicillian Asphalt Paving Co.*, 170 N. Y. 40, 62 N. E. 772, 57 L. R. A. 176, 88 Am. St. Rep. 636.

It is said that the weight of authority is contra. *Sutherland, Dam.* (4th Ed.) p. 404.

*Repetition of Wrong*

Where an action has been brought for a wrong, and the wrong is subsequently repeated, a new action must be brought to recover the damages caused thereby. Such repetition constitutes a new cause of action, and compensation for the loss as caused by one wrong cannot be recovered in an action brought to recover the damages caused by another and a distinct wrong.<sup>66</sup>

*Continuing Torts and Breaches of Contract*

A single wrongful act, however, may be of such a nature as to give rise to a continuous succession of torts or breaches of contracts. "In the case of a personal injury, the act complained of is complete and ended before the date of the writ. It is the damage only that continues and is recoverable, because it is traced back to the act; while in the case of a nuisance it is the act which continues, or, rather is renewed day by day."<sup>67</sup>

A continuing tort or breach of contract is, in effect, simply the repetition of the same wrong an infinite number of times.<sup>68</sup>

As a general rule, where a continuous duty is imposed by contract, each moment its performance is neglected constitutes a separate breach, for which an action will lie. This has been held in actions for the breach of contracts for support;<sup>69</sup> contracts not to engage in business;<sup>70</sup> and contracts to repair.<sup>71</sup>

Where permanent structures have been erected which result in injury to land, there is much confusion and conflict in the authorities as to whether all the damages, past and prospective, may be recovered in a single suit, or whether successive actions must be brought to recover compensation for the damage as it arises.<sup>72</sup>

<sup>66</sup> The repetition of a libel in another newspaper owned by the same defendant is a distinct wrong. *Cook v. Connors*, 215 N. Y. 175, 109 N. E. 78, L. R. A. 1916A, 1074, Ann. Cas. 1917A, 248.

<sup>67</sup> *Rockland Water Co. v. Tillson*, 69 Me. 255, 268.

<sup>68</sup> *Beach v. Crain*, 2 N. Y. 86, 49 Am. Dec. 369.

And damages are recoverable only up to the commencement of the action. *Sutherland*, Dam. (4th Ed.) § 125; *Park & Sons Co. v. Hubbard*, 134 App. Div. 468, 119 N. Y. Supp. 347.

<sup>69</sup> *Fay v. Guynon*, 131 Mass. 31; *Parker v. Russell*, 133 Mass. 74; *Schell v. Plumb*, 55 N. Y. 592. See *Ferguson v. Ferguson*, 2 N. Y. 360.

<sup>70</sup> *Hunt v. Tibbetts*, 70 Me. 221; *Just v. Greve*, 13 Ill. App. 302.

<sup>71</sup> *Beach v. Crain*, 2 N. Y. 86, 49 Am. Dec. 369. As to nuisances, see, also, *Denver City Irrigation & Water Co. v. Middaugh*, 12 Colo. 434, 21 Pac. 565, 13 Am. St. Rep. 234; *Markley v. Duncan*, Harp. (S. C.) 276; *Cobb v. Smith*, 38 Wis. 21; *Stadler v. Grieben*, 61 Wis. 500, 21 N. W. 629. See, also, *Pearson v. Carr*, 97 N. C. 194, 1 S. E. 916; *Dailey v. Dismal Swamp Canal Co.*, 24 N. C. 222.

<sup>72</sup> *Chicago & E. I. R. Co. v. Loeb*, 118 Ill. 203, 8 N. E. 460, 59 Am. Rep. 341; *Jeffersonville, M. & I. R. Co. v. Esterle*, 13 Bush (Ky.) 667. But see *Uline*

The conflict relates for the most part to structures that are maintained for a public use, but are not authorized by law, or are authorized upon condition that compensation be paid.<sup>73</sup>

## CARRIERS OF GOODS—DAMAGES FOR REFUSAL TO TRANSPORT

50. The measure of damages for refusal to receive and transport goods is the difference between the value of the goods at the time and place of refusal, and what would have been their value at the time and place where they should have been delivered, with an allowance for what the freight charges would have been.<sup>74</sup>
51. If other reasonable mode of conveyance can be procured, the measure of damages is the increased cost of transportation.<sup>75</sup>

v. New York Cent. & H. R. R. Co., 101 N. Y. 98, 4 N. E. 536, 54 Am. Rep. 661; Stowers v. Gilbert, 156 N. Y. 600, 51 N. E. 282; Pond v. Metropolitan El. Ry. Co., 112 N. Y. 186, 19 N. E. 487, 8 Am. St. Rep. 734. Cf. Cadle v. Muscatine Western R. Co., 44 Iowa, 11; Aldworth v. City of Lynn, 153 Mass. 53, 26 N. E. 229, 10 L. R. A. 210, 25 Am. St. Rep. 608; City of Eufaula v. Simmons, 86 Ala. 515, 6 South. 47; Reed v. State, 108 N. Y. 407, 15 N. E. 735; Duryea v. Mayor, etc., of City of New York, 26 Hun (N. Y.) 120. See, also, City of North Vernon v. Voegler, 103 Ind. 314, 2 N. E. 821. See Hale, Dam. (2d Ed.) p. 121.

<sup>73</sup> That successive actions may be brought. Dietzel v. New York, 218 N. Y. 270, 112 N. E. 720; Aldworth v. City of Lynn, 153 Mass. 53, 26 N. E. 229, 10 L. R. A. 210, 25 Am. St. Rep. 608. Only one action. Chicago & C. Co. v. Loeb, 118 Ill. 203, 8 N. E. 460, 59 Am. Rep. 341.

<sup>74</sup> Pennsylvania R. Co. v. Titusville & P. Plank R. Co., 71 Pa. 350; Galena & C. U. R. Co. v. Rae, 18 Ill. 488, 68 Am. Dec. 574; Harvey v. Connecticut & P. R. R. Co., 124 Mass. 421, 26 Am. Rep. 673; Bridgman v. The Emily, 18 Iowa, 509; Ward's Cent. & Pac. Lake Co. v. Elkins, 34 Mich. 439, 22 Am. Rep. 544; O'Conner v. Forster, 10 Watts (Pa.) 418; Bracket v. McNair, 14 Johns. (N. Y.) 170, 7 Am. Dec. 447.

<sup>75</sup> O'Conner v. Forster, 10 Watts (Pa.) 418; Ogden v. Marshall, 8 N. Y. 340, 59 Am. Dec. 497; Grund v. Pendergast, 58 Barb. (N. Y.) 216; Higginson v. Weld, 14 Gray (Mass.) 165; Crouch v. Railway Co., 11 Exch. 742. See, also, Nelson v. Plimpton Fireproof Elevating Co., 55 N. Y. 480. Cf. Bohn v. Cleaver, 25 La. Ann. 419. Plaintiff cannot recover for damages caused by his failure to properly care for the goods while they were in store, awaiting transportation, and before they had been accepted by the carrier. Hamilton v. McPherson, 28 N. Y. 72, 84 Am. Dec. 330. One with whom a carrier has made a contract for transporting his goods may, in case of breach, elect to sue for damages for failure to perform the public duties of a carrier, or he may waive the tort, and sue for breach of the special contract. Hutch. Carr. §§ 737-748; Denman v. Chicago, B. & Q. R. Co., 52 Neb. 140, 71 N. W. 967; Sutherland, Dam. (4th Ed.) § 899.

**SAME—DAMAGES FOR LOSS OR NONDELIVERY**

52. The measure of damages for total loss or nondelivery is the value of the goods at the time and place they should have been delivered.<sup>76</sup>

Obviously, the natural and probable consequences of a failure to deliver the goods at their destination is a loss to the owner, amounting to the value of the goods at that point, and such value is therefore the measure of damages.

**SAME—DAMAGES FOR INJURY IN TRANSIT**

53. The measure of damages for injury to goods in transit is the difference between the value of the goods at the time and place of delivery in their damaged condition, and what their value would have been had they been delivered in good order.<sup>77</sup>

**SAME—DAMAGES FOR DELAY**

54. The measure of damages for delay is the difference between the market value of the goods at the time and place fixed for delivery, and their market value at the time and place of actual delivery.<sup>78</sup>
55. Where there is no market, the measure of damages is the value of their use during the period of delay.<sup>79</sup>

<sup>76</sup> *Rodocanachi v. Milburn*, 18 Q. B. Div. 67. Cf. *Magnin v. Dinsmore*, 56 N. Y. 168; *Id.*, 62 N. Y. 35, 20 Am. Rep. 442, and 70 N. Y. 410, 26 Am. Rep. 608. See, also, *Faulkner v. Hart*, 82 N. Y. 413, 37 Am. Rep. 574; *Spring v. Haskell*, 4 Allen (Mass.) 112; *Sturgess v. Bissell*, 46 N. Y. 462. But see *The Telegraph*, 14 Wall. 258, 20 L. Ed. 807; *Krohn v. Oechs*, 48 Barb. (N. Y.) 127; *McKahan v. American Express Co.*, 209 Mass. 270, 95 N. E. 785, 35 L. R. A. (N. S.) 1046, Ann. Cas. 1912B, 612; *United S. S. Co. v. Haskins*, 181 Fed. 962, 104 C. C. A. 426; *King v. Sherwood*, 22 App. Div. 548, 48 N. Y. Supp. 34.

<sup>77</sup> *Notara v. Henderson*, L. R. 7 Q. B. 225; *Chicago, B. & Q. R. Co. v. Hale*, 83 Ill. 360, 25 Am. Rep. 403; *Brown v. Cunard S. S. Co.*, 147 Mass. 58, 16 N. E. 717; *Louisville & N. R. Co. v. Mason*, 11 Lea (Tenn.) 116; *Magdeburg General Ins. Co. v. Paulson* (D. C.) 29 Fed. 530; *The Mangalore* (D. C.) 23 Fed. 463. See *Morrison v. I. & V. Florio S. S. Co.* (D. C.) 36 Fed. 569, 571; *The Compta*, 5 Sawy. 137, Fed. Cas. No. 3,070; *Bowman v. Teall*, 23 Wend. (N. Y.) 306, 35 Am. Dec. 562; *Hackett v. B., C. & M. R. R.*, 35 N. H. 390; *Western Mfg. Co. v. The Guiding Star* (C. C.) 37 Fed. 641; *Sutherland*, Dam. (4th Ed.) § 918.

<sup>78</sup> *Hudson v. Northern Pac. Ry. Co.*, 92 Iowa, 231, 60 N. W. 608, 54 Am. St.

<sup>79</sup> See footnote 79 on following page.

## SAME—CONSEQUENTIAL DAMAGES

56. Consequential damages arising from a carrier's default may be recovered provided they are natural and probable consequences of the breach of duty.<sup>80</sup>

## DAMAGES FOR INJURIES TO PASSENGER

57. "The obligation or responsibilities of public carriers do not arise altogether or mainly out of contracts; they are principally imposed by law. The refusal to undertake the conveyance of a passenger without excuse, or when actionable, is merely a violation of a carrier's duty."

Contracts, however, are usually made fixing the extent of the route, the mode of conveyance, the kind of accommodations, the time, etc.; and therefore actions founded upon such contracts may be maintained. Whether the action be upon the breach of duty or for violation of contract, to the extent that they involve the same acts and omissions, the damages as measured by law are substantially the same.<sup>81</sup>

The consequences in this class of cases fall directly upon the person, and in most cases are not distinguishable from those of a tort. In either tort or contract the damages are measured by the probable or natural consequences of the wrong, but the natural and probable

Rep. 550; *Wilson v. Railway Co.*, 9 C. B. (N. S.) 632; *Cutting v. Grand Trunk R. Co.*, 13 Allen (Mass.) 381; *The Caledonia*, 157 U. S. 124, 139, 15 Sup. Ct. 537, 39 L. Ed. 644; *Weston v. Grand Trunk Ry. Co.*, 54 Me. 376, 92 Am. Dec. 552; *Sherman v. Hudson River R. Co.*, 64 N. Y. 254; *Ward v. New York Cent. R. Co.*, 47 N. Y. 29, 7 Am. Rep. 405; *Scott v. Boston & New Orleans S. S. Co.*, 106 Mass. 468; *Sutherland, Dam.* (4th Ed.) § 906; *Frey v. N. Y. Cent. & H. R. R. Co.*, 114 App. Div. 747, 100 N. Y. Supp. 225.

<sup>79</sup> *United States Exp. Co. v. Haines*, 67 Ill. 137. *Priestly v. Northern Indiana & C. R. Co.*, 26 Ill. 206, 79 Am. Dec. 369; *Davidson Development Co. v. Southern Ry. Co.*, 147 N. C. 503, 61 S. E. 381; *Lord v. Maine Cent. R. Co.*, 105 Me. 255, 74 Atl. 117.

<sup>80</sup> *Vicksburg & M. R. Co. v. Ragsdale*, 46 Miss. 458; *Hadley v. Baxendale*, 9 Exch. 341; *Gee v. Railway Co.*, 6 Hurl. & N. 211. As to sufficiency of notice of special circumstances, see *Horne v. Railway Co.*, L. R. 8 C. P. 131, affirming L. R. 7 C. P. 583. See, also, *Cobb v. Illinois Cent. R. Co.*, 38 Iowa, 601, 630; *Harvey v. Connecticut & P. R. R. Co.*, 124 Mass. 421, 26 Am. Rep. 673; *Pennsylvania R. Co. v. Titusville & P. Plank R. Co.*, 71 Pa. 350; *Hales v. Railway Co.*, 4 Best & S. 66; *Farwell v. Davis*, 66 Barb. (N. Y.) 73; *Mather v. American Express Co.*, 138 Mass. 55, 52 Am. Rep. 258; *Black v. Baxendale*, 1 Exch. 410; *Favor v. Philbrick*, 5 N. H. 358; *Swift River Co. v. Fitchburg R. Co.*, 169 Mass. 326, 47 N. E. 1015, 61 Am. St. Rep. 288.

<sup>81</sup> 3 *Suth. Dam.* (4th Ed.) 934.



consequences of a breach of contract must be determined with regard to all the facts known to the parties at the time the contract was made.<sup>82</sup>

### SAME—EXEMPLARY DAMAGES

58. Where the action is upon the contract, exemplary damages cannot be recovered;<sup>83</sup> but where the action is for a tort, founded on a breach of the public duty, exemplary damages may be given in proper cases.<sup>84</sup>

### SAME—PERSONAL INJURY

59. In actions for personal injury to a passenger, the measure of damages is usually the same as in ordinary cases of personal injury.<sup>85</sup>

### SAME—FAILURE TO CARRY PASSENGER—DELAY

60. Damages for failure to transport a passenger include compensation for the increase of cost of carriage by another conveyance, the loss of time, and other ordinary expenses of delay.<sup>86</sup>

<sup>82</sup> Cf. *Hobbs v. Railway Co.*, 10 Q. B. 111, with *McMahon v. Field*, 7 Q. B. Div. 591; *Williams v. Vanderbilt*, 28 N. Y. 217, 84 Am. Dec. 333; *Alabama G. S. R. Co. v. Heddleston*, 82 Ala. 218, 3 South. 53; *Baltimore City Pass. Ry. Co. v. Kemp*, 61 Md. 74, 619; *Murdock v. Boston & A. Railroad Co.*, 133 Mass. 15, 43 Am. Rep. 480; *Cincinnati, H. & I. R. Co. v. Eaton*, 94 Ind. 474, 48 Am. Rep. 179; 2 Sedg. Dam. § 868; *Brown v. Chicago, M. & St. P. Ry. Co.*, 54 Wis. 342, 11 N. W. 356, 911, 41 Am. Rep. 41; *O'Rourke v. Cunard S. S. Co.*, 169 App. Div. 943, 154 N. Y. Supp. 29; *Forrester v. Southern Pac. Co.*, 36 Nev. 247, 134 Pac. 753, 48 L. R. A. (N. S.) 1.

<sup>83</sup> *New Orleans, J. & G. N. R. Co. v. Hurst*, 36 Miss. 660, 74 Am. Dec. 785; *Hamlin v. Railway Co.*, 1 Hurl. & N. 408, 411. Contra: *Forrester v. Southern Pac. Co.*, supra.; *Williams v. Carolina & W. R. Co.*, 144 N. C. 498, 57 S. E. 216, 12 L. R. A. (N. S.) 191, 12 Ann. Cas. 1000.

<sup>84</sup> *Heirn v. McCaughan*, 32 Miss. 17, 66 Am. Dec. 588; *Thomp. Carr.* p. 546, § 5; *Id.* p. 573, § 27.

<sup>85</sup> Sedg. Dam. § 860; *Sutherland, Dam.* (4th Ed.) § 934; *Busch v. Interborough Rapid Transit Co.*, 187 N. Y. 388, 80 N. E. 197, 10 Ann. Cas. 460.

<sup>86</sup> *Baltimore & O. R. Co. v. Carr*, 71 Md. 135, 17 Atl. 1052; *Eddy v. Harris*, 78 Tex. 661, 15 S. W. 107, 22 Am. St. Rep. 88; *Porter v. The New England No. 2*, 17 Mo. 290; *The Zenobia*, 1 Abb. Adm. 80, Fed. Cas. No. 18,209; *Williams v. Vanderbilt*, 28 N. Y. 217, 84 Am. Dec. 333; *Miller v. Baltimore & O. R. Co.*, 89 App. Div. 457, 85 N. Y. Supp. 883; *Sutherland, Dam.* (4th Ed.) § 935.

### **SAME—FAILURE TO CARRY TO DESTINATION— WRONGFUL EJECTION**

61. Where a carrier fails to carry a passenger to his destination, and sets him down, at some intermediate point, compensation may be recovered for all the expenses of delay,<sup>87</sup> including loss of time,<sup>88</sup> and cost of a reasonable conveyance to his destination.<sup>89</sup>

He may also recover compensation for the indignity of the expulsion from a train, and, if there are aggravating circumstances, he may recover exemplary damages.<sup>90</sup>

Where, by the fault of the carrier's agents, and without the passenger's fault, the ticket of the passenger is not such a one as he should have to entitle him to passage, the carrier will be liable in damages for expelling him.<sup>91</sup>

### **CONTRACTS TO SELL REAL PROPERTY—BREACH BY VENDOR**

62. The measure of damages for the breach by a vendor of his contract to sell real property is the difference between the contract price and the market value of the land at the time of the breach, plus any part of the purchase price which has been paid, with interest.

<sup>87</sup> *Chicago & A. R. Co. v. Flagg*, 43 Ill. 364, 92 Am. Dec. 133; *Pennsylvania R. Co. v. Connell*, 127 Ill. 419, 20 N. E. 89; carrying beyond, *Trigg v. St. Louis, K. C. & N. Ry. Co.*, 74 Mo. 147, 41 Am. Rep. 305; *Miller v. Baltimore & O. R. Co.*, supra; *Trout v. Watkins Livery & Undertaking Co.*, 148 Mo. App. 621, 130 S. W. 136. See *Daymon v. Westchester St. R. Co.*, 154 App. Div. 796, 139 N. Y. Supp. 751.

<sup>88</sup> *Hamilton v. Third Ave. R. Co.*, 53 N. Y. 25.

<sup>89</sup> *Indianapolis, B. & W. Ry. Co. v. Birney*, 71 Ill. 391; *Pennsylvania R. Co. v. Connell*, 127 Ill. 419, 20 N. E. 89; *Francis v. St. Louis Transfer Co.*, 5 Mo. App. 7; *Hamilton v. Third Ave. R. Co.*, 53 N. Y. 25. Cf. *Miller v. King*, 88 Hun, 181, 34 N. Y. Supp. 425.

<sup>90</sup> *Hanson v. European & N. A. Ry. Co.*, 62 Me. 84, 16 Am. Rep. 404; *Yates v. New York Cent. & H. R. Co.*, 67 N. Y. 100.

But in some states exemplary damages are not allowed against a corporation for the malice of its servants. See p. 489.

<sup>91</sup> *Lake Erie & W. R. Co. v. Fix*, 88 Ind. 381, 45 Am. Rep. 464; *Murdock v. Boston & A. R. Co.*, 137 Mass. 293, 50 Am. Rep. 307; *Yorton v. Milwaukee, L. S. & W. Ry. Co.*, 54 Wis. 234, 11 N. W. 482, 41 Am. Rep. 23; *Id.*, 62 Wis. 367, 21 N. W. 516, and 23 N. W. 401; *Bradshaw v. South Boston R. Co.*, 135 Mass. 407, 46 Am. Rep. 481; *Cowen v. Winters*, 96 Fed. 929, 37 C. C. A. 628.

**EXCEPTION**—In some states the vendee can recover, in addition to purchase money advanced, with interest and expenses, only nominal damages for a breach of the contract, due to failure of the vendor's title, provided the vendor acted in good faith.

In most American states a vendee can recover substantial damages for his vendor's breach of contract to convey real property;<sup>92</sup> that is, the vendee is given the benefit of his bargain. This is of particular importance when the property has risen in value after the contract of sale was entered into.<sup>93</sup>

The value of the land in estimating the damages is taken at the time it should have been conveyed under the contract.<sup>94</sup>

*Nominal Damages Only—The English Rule*

In England an anomalous rule of damages has been adopted in actions against vendors for breach of contracts to sell, to the effect that the vendee cannot recover for the loss of his bargain, whether the vendor has been guilty of fraud or not. If there has been fraud, the vendee can only recover nominal damages in an action for breach of contract; and, to recover substantial damages, he must bring an action for deceit.<sup>95</sup>

The uncertainty of English titles is assigned as the reason for the rule, but such considerations have no place under our registry laws. The English rule has been followed, however, in some states. In Pennsylvania this is carried so far that only nominal damages are re-

<sup>92</sup> *Hopkins v. Lee*, 6 Wheat. 109, 5 L. Ed. 218; *Plummer v. Rigdon*, 78 Ill. 222, 20 Am. Rep. 261; *Loomis v. Wadhams*, 8 Gray (Mass.) 557; *Skaaraas v. Finnegan*, 31 Minn. 48, 16 N. W. 456; *Case v. Wolcott*, 33 Ind. 5; *Robinson v. Heard*, 15 Me. 296; *Irwin v. Askew*, 74 Ga. 581; *Barbour v. Nichols*, 3 R. I. 187; *Russ v. Telfener* (C. C.) 57 Fed. 973; *Spaulding v. Smith* (Tex. Civ. App.) 169 S. W. 627.

<sup>93</sup> *Hopkins v. Lee*, 6 Wheat. 109, 5 L. Ed. 218.

<sup>94</sup> *Allen v. Atkinson*, 21 Mich. 351; *Combs v. Scott*, 76 Wis. 662, 45 N. W. 532; *Plummer v. Rigdon*, 78 Ill. 222, 20 Am. Rep. 261; *Whiteside v. Jennings*, 19 Ala. 784. For breach of a contract to give a lease, the measure of damages is the value of the lease; that is, the difference between the value of the premises for the term and the rent which was to be paid. *Loyd v. Capps* (Tex. Civ. App.) 29 S. W. 505; *Poposkey v. Munkwitz*, 68 Wis. 322, 32 N. W. 35, 60 Am. Rep. 858; *Trull v. Granger*, 8 N. Y. 115. Expenses necessarily caused by the lessor's breach may be added. *Yeager v. Weaver*, 64 Pa. 425. But see, for expenses not recoverable, *Eddy v. Coffin*, 149 Mass. 463, 21 N. E. 870, 14 Am. St. Rep. 441.

<sup>95</sup> The leading cases establishing the rule in that country are *Flureau v. Thornhill*, 2 W. Bl. 1078, and *Bain v. Fothergill*, L. R. 7 H. L. 158. See *Robinson v. Harman*, 1 Exch. 850; *Morgan v. Russell*, [1909] 1 K. B. 357.

coverable, even in cases where the vendor knew that his title was not good.<sup>96</sup>

But in the other states which follow the English rule it is necessary that the vendor act in good faith, or he is held liable for substantial damages.<sup>97</sup>

The New York rule is that "the vendee in a contract for the sale of land, in the absence of fraud or bad faith, is not entitled to recover, aside from the purchase money paid, and expenses of examination of the title, other than nominal damages as for breach on the part of the vendor arising from his inability to convey a good or marketable title."<sup>98</sup>

Many states state the rule in such cases to be that, if the vendor fails to convey because he has not a good title, he is always liable to the vendee in substantial damages for the loss of the bargain. This rule is not to be varied because the vendor acted in good faith.<sup>99</sup>

### SAME—BREACH BY VENDEE

#### 63. The measure of damages for the breach by a vendee of his contract to purchase real property is the difference between the contract price and the value of the land.<sup>1</sup>

In some cases the vendor has been permitted to recover the contract price;<sup>2</sup> but this gives him more than compensation, since he still has

<sup>96</sup> *Burk v. Serrill*, 80 Pa. 413, 21 Am. Rep. 105; *McCafferty v. Griswold*, 99 Pa. 276; *McNair v. Compton*, 35 Pa. 23; *Gerbert v. Trustees of the Congregation of Sons of Abraham*, 59 N. J. Law, 160, 35 Atl. 1121, 69 L. R. A. 764, 59 Am. St. Rep. 578. But see *Hennershotz v. Gallagher*, 124 Pa. 1, 16 Atl. 518.

<sup>97</sup> *Pumpelly v. Phelps*, 40 N. Y. 59, 100 Am. Dec. 463; *Conger v. Weaver*, 20 N. Y. 140; *Margraf v. Muir*, 57 N. Y. 155; *Walton v. Meeks*, 120 N. Y. 79, 23 N. E. 1115. See *Rineer v. Collins*, 156 Pa. 342, 27 Atl. 28; *Heimburg v. Ismay*, 35 N. Y. Super. Ct. 35.

<sup>98</sup> *Walton v. Meeks*, 120 N. Y. 79, 23 N. E. 1115; *Northridge v. Moore*, 118 N. Y. 419, 23 N. E. 570. See *Pumpelly v. Phelps*, 40 N. Y. 66, 100 Am. Dec. 463; *Empire Realty Corp. v. Sayre*, 107 App. Div. 415, 95 N. Y. Supp. 371.

<sup>99</sup> *Doherty v. Dolan*, 65 Me. 87, 20 Am. Rep. 677; *Hartzell v. Crumb*, 90 Mo. 629, 3 S. W. 59; *Hopkins v. Lee*, 6 Wheat. 109, 5 L. Ed. 218; *Plummer v. Rigdon*, 78 Ill. 222, 20 Am. Rep. 261.

The subject is extensively treated in *Sutherland, Dam.* (4th Ed.) § 578 et seq.

<sup>1</sup> *Allen v. Mohn*, 86 Mich. 328, 49 N. W. 52, 24 Am. St. Rep. 126; *Old Colony R. Corp. v. Evans*, 6 Gray (Mass.) 25, 66 Am. Dec. 394; *Ellet v. Paxson*, 2 Watts & S. (Pa.) 418; *Griswold v. Sabin*, 51 N. H. 167, 12 Am. Rep. 76; *Porter v. Travis*, 40 Ind. 556; *Anderson v. Truitt*, 53 Mo. App. 590. But see *McGuinness v. Whalen*, 16 R. I. 558, 18 Atl. 158, 27 Am. St. Rep. 763; *Hallett v. Taylor*, 177 Mass. 6, 58 N. E. 154; *Baerenklau v. Peerless Realty Co.*, 80 N. J. Eq. 26, 83 Atl. 375; *Booth v. Milliken*, 127 App. Div. 522, 111 N. Y. Supp. 791.

<sup>2</sup> *Richards v. Edick*, 17 Barb. (N. Y.) 260; *Goodpaster v. Porter*, 11 Iowa,

the land.<sup>3</sup> Where the vendee has been in possession, interest on the whole amount of purchase money unpaid has been allowed as additional damages.<sup>4</sup>

## BREACH OF COVENANTS—SEISIN AND RIGHT TO CONVEY

64. The measure of damages for breach of a covenant of seisin or right to convey is the purchase price paid, with interest, and costs of the ejectment suit.<sup>5</sup>

If the eviction is only partial, a proportionate amount of the consideration paid is recovered.<sup>6</sup>

If there has been no eviction, only nominal damages can be recovered.<sup>7</sup>

## SAME—WARRANTY AND QUIET ENJOYMENT

65. In nearly all the states the damages which are given on covenants of warranty and quiet enjoyment are based on the old feudal doctrine of warranty, and the value of the land at the time of the covenant is made the measure. But the value of the land is taken at the price which was paid for it. Though this may be contrary to all the fundamental principles of damages, it is certainly the rule in the great majority of states.<sup>8</sup>

161; *Inhabitants of Alna v. Plummer*, 4 Me. (4 Greenl.) 258; *Gray v. Meek*, 199 Ill. 136, 64 N. E. 1020; *Murray v. Ellis*, 112 Pa. 485, 3 Atl. 845.

<sup>3</sup> *Laird v. Pirn*, 7 M. & W. 474. See *Sutherland*, Dam. (4th Ed.) § 568.

The New York cases are in conflict. *Richards v. Edick* supra. Contra: *Bensinger v. Erhardt*, 74 App. Div. 169, 77 N. Y. Supp. 577. See *Miriam Estates v. Hunold*, 72 Misc. Rep. 64, 129 N. Y. Supp. 68.

<sup>4</sup> *Stevenson v. Maxwell*, 2 N. Y. 408.

<sup>5</sup> *Weber v. Anderson*, 73 Ill. 439; *Bingham v. Weiderwax*, 1 N. Y. 509; *Pitcher v. Livingston*, 4 Johns. (N. Y.) 1, 4 Am. Dec. 229; *Nichols v. Walter*, 8 Mass. 243; *Bickford v. Page*, 2 Mass. 455; *Rickert v. Snyder*, 9 Wend. (N. Y.) 416. But see *Smith v. Strong*, 14 Pick. (Mass.) 128, a case where the consideration paid could not be proved.

See *Sedgwick*, Dam. (9th Ed.) § 966; *Reeves*, Real Property, § 1144; *Hale*, Dam. (2d Ed.) § 161.

<sup>6</sup> *Tone v. Wilson*, 81 Ill. 529; *Guthrie v. Pugsley*, 12 Johns. (N. Y.) 126; *Morris v. Phelps*, 5 Johns. (N. Y.) 49, 4 Am. Dec. 323; *Cornell v. Jackson*, 3 Cush. (Mass.) 506; *Hartford & Salisbury Ore Co. v. Miller*, 41 Conn. 112.\*

<sup>7</sup> *Smith v. Hughes*, 50 Wis. 620, 7 N. W. 653; *Cockrell v. Proctor*, 65 Mo. 41.

<sup>8</sup> *Staats v. Ten Eyck's Ex'rs*, 3 Caines (N. Y.) 111, 2 Am. Dec. 254; *Harding v. Larkin*, 41 Ill. 413; *Devine v. Lewis*, 38 Minn. 24, 35 N. W. 711; *Brandt v. Foster*, 5 Iowa, 287. But see *Brooks v. Black*, 68 Miss. 161, 8 South. 332, 11

According to some authorities, the rule is that, "if the eviction has been from all the lands conveyed, the recovery has been limited to the purchase price paid and interest for the time of dispossession; if from a definite part capable of definite ascertainment and boundary, then to such part of the original price as bears the same ratio to the whole consideration that the value of the land to which the title has failed bears to the value of the whole premises;"<sup>9</sup> and that, "without the aid of fraud or bad faith, nothing can be recovered for improvements made or for the increased value of the premises produced by them,"<sup>10</sup> though the value of such improvements is deducted from the mesne profits which are recovered by the real owner.<sup>11</sup>

**EXCEPTION**—In a few states the measure of damages for breach of these covenants is the value of the land at the time of eviction,<sup>12</sup> including improvements.<sup>13</sup>

This is said to be the rule in England and the New England states, excepting New Hampshire.<sup>14</sup>

### SAME—AGAINST INCUMBRANCES

66. The measure of damages for breach of a covenant against incumbrances is:

- (a) For a permanent incumbrance, the diminution in the value of the premises due to the incumbrance,—not exceeding, in most states, the consideration paid; in others, not exceeding the value of the land.<sup>15</sup>

L. R. A. 176, 24 Am. St. Rep. 259. See Sedgwick, Dam. (9th Ed.) § 956 et seq.; Reeves, Real Property, § 1148; Hale, Dam. (2d Ed.) § 162.

<sup>9</sup> See *Hymes v. Esty*, 133 N. Y. 342, 347, 31 N. E. 105.

<sup>10</sup> See *Walton v. Meeks*, 120 N. Y. 83, 23 N. E. 1115; *Pitcher v. Livingston*, 4 Johns. (N. Y.) 1, 4 Am. Dec. 229; *Hunt v. Raplee*, 44 Hun (N. Y.) 149; *Ela v. Card*, 2 N. H. 175, 9 Am. Dec. 46; *Sedg. Dam.* § 951; *Taylor v. Wallace*, 20 Colo. 211, 37 Pac. 963; *Wetzell v. Richcreek*, 53 Ohio St. 62, 40 N. E. 1007; *Copeland v. McAdory*, 100 Ala. 553, 560, 13 South. 545; *Furnas v. Durgin*, 119 Mass. 500, 20 Am. Rep. 341.

<sup>11</sup> *Green v. Biddle*, 8 Wheat. 1, 5 L. Ed. 547; *Woodhull v. Rosenthal*, 61 N. Y. 396; *Hodgkins v. Price*, 141 Mass. 162, 5 N. E. 502; *Stark v. Starr*, Fed. Cas. No. 13,307.

<sup>12</sup> *Norton v. Babcock*, 2 Metc. (Mass.) 510; *Hardy v. Nelson*, 27 Me. 525; *Keeler v. Wood*, 30 Vt. 242; *Sterling v. Peet*, 14 Conn. 245.

<sup>13</sup> *Coleman v. Ballard's Heirs*, 13 La. Ann. 512; *Bunny v. Hopkinson*, 27 Beav. 565.

<sup>14</sup> *Sedgwick, Dam.* (9th Ed.) § 962; *Jenkins v. Jones*, 9 Q. B. 128; *Gore v. Boozler*, 3 Mass. 523, 3 Am. Dec. 182; *Cecconi v. Rodden*, 147 Mass. 164, 16 N. E. 749; *Beck v. Staats*, 80 Neb. 482, 114 N. W. 633, 16 L. R. A. (N. S.) 768.

<sup>15</sup> *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335; *Harlow v. Thomas*, 15

- (b) For an incumbrance which causes a total eviction, the consideration, with interest and costs, in most states;<sup>16</sup> or the amount necessarily paid to avoid eviction, not exceeding the consideration;<sup>17</sup> or the value of the land, with interest in others;<sup>18</sup> and, for a partial eviction, a proportionate amount.<sup>19</sup>

### *Removable Incumbrances*

Where incumbrances exist, such as mortgages, which can be removed by the payment of money, the grantee, if no fraud intervenes, and no attempt has been made to enforce the incumbrance, can recover nominal damages only, unless he shall have paid the amount;<sup>20</sup> but this must not exceed the price or value of the land, as the case may be.<sup>21</sup>

The covenantee must not pay more than is necessary in removing the incumbrance.<sup>22</sup>

Pick. (Mass.) 66; Grant v. Tallman, 20 N. Y. 191, 75 Am. Dec. 384; Mackey v. Harmon, 34 Minn. 168, 24 N. W. 702; Kellogg v. Malin, 62 Mo. 429; Mitchell v. Stanley, 44 Conn. 312; Clark v. Zeigler, 79 Ala. 346; Koestenbader v. Peirce, 41 Iowa, 204; Herb v. Metropolitan Hospital & Dispensary, 80 App. Div. 145, 80 N. Y. Supp. 552.

See Sedgwick, Dam. (9th Ed.) § 970; Reeves, Real Property, § 1146; Hale, Dam. (2d Ed.) § 163.

<sup>16</sup> Dimmick v. Lockwood, 10 Wend. (N. Y.) 142; Grant v. Tallman, 20 N. Y. 191, 75 Am. Dec. 384; Howell v. Moores, 127 Ill. 67, 19 N. E. 863; Stewart v. Drake, 9 N. J. Law, 139.

<sup>17</sup> Dillahunty v. Little Rock & Ft. S. Ry. Co., 59 Ark. 699, 27 S. W. 1002, 28 S. W. 657.

<sup>18</sup> Barrett v. Porter, 14 Mass. 143; Horsford v. Wright, Kirby (Conn.) 3, 1 Am. Dec. 8; Rickert v. Snyder, 9 Wend. (N. Y.) 416; Terry's Ex'r v. Drabensstadt, 68 Pa. 400. But see Harrington v. Murphy, 109 Mass. 299.

<sup>19</sup> Harlow v. Thomas, 15 Pick. (Mass.) 66; Alexander v. Bridgford, 59 Ark. 195, 27 S. W. 69.

<sup>20</sup> Delavergne v. Norris, 7 Johns. (N. Y.) 358, 5 Am. Dec. 281; Grant v. Tallman, 20 N. Y. 191, 75 Am. Dec. 384; McGuckin v. Milbank, 83 Hun, 473, 31 N. Y. Supp. 1049, affirmed 152 N. Y. 297, 46 N. E. 490; Prescott v. Truman, 4 Mass. 627, 3 Am. Dec. 246; Winslow v. McCall, 32 Barb. (N. Y.) 241; Hall v. Dean, 13 Johns. (N. Y.) 105.

<sup>21</sup> Johnson v. Collins, 116 Mass. 392; Grant v. Tallman, 20 N. Y. 191, 75 Am. Dec. 384; Bailey v. Scott, 13 Wis. 618.

<sup>22</sup> Bradshaw v. Crosby, 151 Mass. 237, 24 N. E. 47; Coburn v. Litchfield, 132 Mass. 449. For breach of covenants to remove incumbrances, see Somers v. Wright, 115 Mass. 292.

### SAME—COVENANTS IN LEASES

67. When any of the foregoing covenants occur in leases, the same rules generally govern the damages for their breach, as when they are found in deeds.<sup>23</sup>

Anciently, the rule was that, where the lessor was sued for a breach of a covenant to give possession, the lessee could, ordinarily, recover only nominal damages and incidental expenses, but nothing for the value of the lease. But this rule was inapplicable where, when the lessor covenanted to give possession, he must be deemed to have known that he had no authority to do so, and the lessor would then be held liable for the loss of the bargain; and the damages in such cases are now usually measured by the difference between the rent reserved and the actual rental value of the premises for the stipulated term. And other damages may also be recovered, provided they are proximate and certain, and were fairly within the contemplation of the parties when the lease was made, or might have been foreseen as a consequence of a breach of its covenants.<sup>24</sup>

The other covenants usually inserted in leases are mere contracts, for the breach of which the principles of damages have already been discussed.<sup>25</sup>

### DAMAGES FOR DEATH BY WRONGFUL ACT

68. At common law no civil action could be maintained for wrongfully causing the death of a human being.<sup>26</sup>

The common-law rule has been unanimously accepted by the courts of the various states and of the United States.<sup>27</sup>

<sup>23</sup> *Dobbins v. Duquid*, 65 Ill. 464; *Sheets v. Joyner*, 11 Ind. App. 205, 38 N. E. 830; *Clark v. Fisher*, 54 Kan. 403, 38 Pac. 493; *Wetzell v. Richcreek*, 53 Ohio St. 62, 40 N. E. 1004.

<sup>24</sup> *Friedland v. Myers*, 139 N. Y. 436, 34 N. E. 1055.

<sup>25</sup> See *Beach v. Crain*, 2 N. Y. 86, 49 Am. Dec. 369; *Thomson-Houston Electric Co. v. Durant Land Imp. Co.*, 144 N. Y. 34, 39 N. E. 7; *United States Trust Co of New York v. O'Brien*, 143 N. Y. 284, 38 N. E. 266; *Gulliver v. Fowler*, 64 Conn. 556, 30 Atl. 852; *Trinity Church v. Higgins*, 48 N. Y. 532; *Penley v. Watts*, 7 Mees. & W. 601. See, also, *Dickinson v. Hart*, 142 N. Y. 183, 36 N. E. 801; *Snow v. Pulitzer*, 142 N. Y. 263, 36 N. E. 1059; *Eastman v. City of New York*, 152 N. Y. 468, 46 N. E. 841.

<sup>26</sup> *Higgins v. Butcher*, 1 Yel. 89; *Baker v. Bolton*, 1 Camp. 493; *Osborn v. Gillett*, L. R. 8 Exch. 88.

<sup>27</sup> *Connecticut Mut. Life Ins. Co. v. New York & N. H. R. Co.*, 25 Conn.



None of the reasons assigned for the rule has been generally accepted as satisfactory, and it rests upon adjudication.<sup>28</sup>

But, almost universally, direct legislation has practically abrogated the rule, by creating a new cause of action, in favor of specified relatives of the deceased who have suffered pecuniary loss, as in the case of Lord Campbell's act, passed in 1846, and similar statutes in most of the states.<sup>29</sup>

Many statutes limit the amount of recovery to \$5,000 or more, but the tendency is to abolish such limitation. In New York the Constitution forbids the creation of any limit.<sup>30</sup>

The New York act provides that the amount recovered shall draw interest from the death, which interest shall be added to the verdict, and inserted in the entry of judgment. This provision is not unconstitutional.<sup>31</sup>

The rate of interest is governed by the statute regulating interest in force at the time of the verdict.<sup>32</sup>

The interest is to be added and inserted by the clerk.<sup>33</sup>

### *Remission of Damages*

Where the verdict is excessive, the plaintiff may frequently cure the error by remitting the excess. Where an item of damage has been erroneously included in the estimate by the jury, the error may be

265, 65 Am. Dec. 571; *Green v. Hudson River R. Co.*, 28 Barb. (N. Y.) 9; *Mobile L. Ins. Co. v. Brame*, 95 U. S. 754, 24 L. Ed. 580.

<sup>28</sup> *Osborn v. Gillett*, L. R. 8 Exch. 88; *Hyatt v. Adams*, 16 Mich. 180; *Green v. Hudson R. R. Co.*, 41 \*N. Y. 294; *Pol. Torts*, 53.

<sup>29</sup> *Tiff. Death Wrong. Act*, p. xvii; *Seward v. The Vera Cruz*, 10 App. Cas. 59; *Whitford v. Panama R. Co.*, 23 N. Y. 465; *Littlewood v. Mayor, etc., of City of New York*, 89 N. Y. 24, 42 Am. Rep. 271; *Hulbert v. City of Topeka* (C. C.) 34 Fed. 510.

<sup>30</sup> *Sedgwick, Dam.* (9th Ed.) § 571a.

<sup>31</sup> *Cornwall v. Mills*, 44 N. Y. Super. Ct. 45.

The New York statute is in Code Civ. Proc. § 1902 et seq.

<sup>32</sup> *Salter v. Utica & B. R. R. Co.*, 86 N. Y. 401; *Id.*, 23 Hun (N. Y.) 533, overruling *Erwin v. Neversink Steamboat Co.*, 23 Hun (N. Y.) 578.

<sup>33</sup> See *Manning v. Port Henry Iron Ore Co.*, 91 N. Y. 665, reversing 27 Hun (N. Y.) 219. As to the measure of damages, see, also, *Blake v. Railway Co.*, 18 Q. B. 93; *Illinois Cent. R. Co. v. Barron*, 5 Wall. 95, 18 L. Ed. 591; *Oldfield v. New York & H. R. Co.*, 14 N. Y. 310; *Murphy v. New York Cent. & H. R. Co.*, 88 N. Y. 445; *Tilley v. Hudson River R. Co.*, 24 N. Y. 471; *Id.*, 29 N. Y. 252, 86 Am. Dec. 297; *Houghkirk v. President, etc., of Delaware & H. Canal Co.*, 92 N. Y. 219, 44 Am. Rep. 370; *Pennsylvania Co. v. Lilly*, 73 Ind. 252; *Illinois Cent. R. Co. v. Weldon*, 52 Ill. 290; *Chicago & N. W. R. Co. v. Whittton*, 13 Wall. 270, 20 L. Ed. 571; *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504, 18 N. E. 108; *Terry v. Jewett*, 78 N. Y. 338; *Ihl v. Forty-Second St. & G. St. Ferry R. Co.*, 47 N. Y. 317, 7 Am. Rep. 450; *Boffe v. Consolidated Telegraph & Electrical Subway Co.*, 171 App. Div. 392, 157 N. Y. Supp. 318.

cured by remitting the amount allowed for such item, provided it can be definitely ascertained; <sup>34</sup> otherwise, not. <sup>35</sup>

In the case of nonpecuniary injuries, where the verdict of the jury is final, unless it shows that the jury were influenced by partiality, prejudice, or passion, the plaintiff has been permitted to remit enough to prevent the verdict from being excessive. It is a common practice for both trial and appellate courts to indicate the amount by which they deem the verdict excessive, and require the plaintiff to remit it, as a condition of refusing a new trial. <sup>36</sup>

It is a grave question whether this practice does not deprive the parties of the right to trial by jury, and it would seem to be an invasion of the province of the jury; <sup>37</sup> but the practice is supported by the weight of authority. <sup>38</sup>

<sup>34</sup> Toledo, W. & W. Ry. Co. v. Beals, 50 Ill. 150; Evertsen v. Sawyer, 2 Wend. (N. Y.) 507; Lambert v. Craig, 12 Pick. (Mass.) 199; King v. Howard, 1 Cush. (Mass.) 137; Kennon v. Gilmer, 131 U. S. 22, 9 Sup. Ct. 696, 33 L. Ed. 110.

<sup>35</sup> Pavay v. American Ins. Co., 56 Wis. 221, 13 N. W. 925.

<sup>36</sup> Upham v. Dickinson, 50 Ill. 97; Hegeman v. Western R. Corp., 13 N. Y. 9, 64 Am. Dec. 517; Doblin v. Murphy, 5 N. Y. Super. Ct. 19; Whitehead v. Kennedy, 69 N. Y. 462, 470.

<sup>37</sup> See dissenting opinions in Burdick v. Missouri Pac. Ry. Co., 123 Mo. 221, 27 S. W. 453, 26 L. R. A. 384, 45 Am. St. Rep. 528.

<sup>38</sup> Baker v. City of Madison, 62 Wis. 137, 22 N. W. 141, 583; Durkes v. Town of Union, 38 N. J. Law, 21; Hopkins v. Orr, 124 U. S. 510, 8 Sup. Ct. 590, 31 L. Ed. 523; Arkansas Valley Land & Cattle Co. v. Mann, 130 U. S. 69, 9 Sup. Ct. 458, 32 L. Ed. 854.





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# Wills

By **GEORGE E. GARDNER.**

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Principles of the law of  
~~contracts as exhibited in~~  
special contractual relations

Date \_\_\_\_\_

Borrower's Name

